

E79JTRU1

Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 IN THE MATTER OF THE TRUSTEESHIP
4 CREATED BY AMERICAN HOME MORTGAGE
5 INVESTMENT TRUST 2005-2 related to
6 the issuance of Mortgage-Backed
7 Notes pursuant to an Indenture dated
8 as of October 1, 2007,

14 Civ. 2494 AKH

9 WELLS FARGO BANK, N.A.,

10
11 Petitioner,

-----x

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1880
1881
1882
1883
1884
1885
1886
1887
1888
1889
1890
1891
1892
1893
1894
1895
1896
1897
1898
1899
1900
1901
1902
1903
1904
1905
1906
1907
1908
1909
1910
1911
1912
1913
1914
1915
1916
1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100
2101
2102
2103
2104
2105
2106
2107
2108
2109
2110
2111
2112
2113
2114
2115
2116
2117
2118
2119
2120
2121
2122
2123
2124
2125
2126
2127
2128
2129
2130
2131
2132
2133
2134
2135
2136
2137
2138
2139
2140
2141
2142
2143
2144
2145
2146
2147
2148
2149
2150
2151
2152
2153
2154
2155
2156
2157
2158
2159
2160
2161
2162
2163
2164

E79JTRU1

Trial

(APPEARANCES CONTINUED)

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorneys for Sceptre, LLC
BY: JONATHAN E. PICKHARDT, Esq.
MAAREN A. SHAH, Esq.
BLAIR A. ADAMS, Esq.
Of counsel

JONES & KELLER
Attorneys for Semper Capital Mgmt.
BY: MICHAEL A. ROLLIN, Esq.
MARITZA DOMINGUEZ BRASWELL, Esq.
TARA K. WILLIAMS, Esq.
Of counsel

E79JTRU1

Trial

1 (Trial resumes)

2 (In open court)

3 THE COURT: Good afternoon. Be seated, please so we
4 have not yet completed the cross-examination of
5 Mr. Peresechensky, right?

6 MR. PICKHARDT: That's correct, your Honor.

7 THE COURT: Is he here?

8 MR. PICKHARDT: I believe he is.

9 THE COURT: Please come up. I remind you that you
10 remain under oath.

11 MR. PICKHARDT: Your Honor, one housekeeping matter.

12 I noted that yesterday I asked Mr. Peresechensky some
13 questions, as your Honor may recall, about ratings, and I had
14 two exhibits related to ratings, Exhibits TX-251 and 252, that
15 it showed the current --

16 THE COURT: Why do we need it?

17 MR. PICKHARDT: There was obviously testimony provided
18 with respect to that. It shows the historical ratings. That
19 is the purpose we would like to have in the record what the
20 historical ratings were with respect to S&P and Moody's with
21 respect to these bonds.

22 MR. ROLLIN: No objection.

23 THE COURT: You you're offering 251 and 252?

24 MR. PICKHARDT: That's correct.

25 THE COURT: Received.

E79JTRU1

Trial

1 (Plaintiff Exhibits TX-251 and TX-252 received in
2 evidence)

3 THE COURT: These are Moody's?

4 MR. PICKHARDT: Moody's and Standard & Poor's.

5 THE COURT: What is Moody's?

6 MR. PICKHARDT: Moody's is 252 and Standard & Poor's
7 is 251.

8 THE COURT: Okay.

9 BORIS PERESECHENSKY,

10 CROSS-EXAMINATION (Continued)

11 BY MR. PICKHARDT:

12 Q. Mr. Peresechensky, as you testified yesterday, you entered
13 into the trade to purchase your 1-A-3 bonds for \$47.50 on
14 September 27th, 2012, right?

15 A. Correct.

16 Q. When you entered into that trade, you were not relying on
17 any statements by Wells Fargo at that time, were you?

18 A. No.

19 Q. In fact, you made your own investment decision, weighing
20 the risks and benefits of that investment at that time, right?

21 A. I performed A thorough quantitative analysis based on
22 credit modeling. I used JP Morgan to perform a thorough -- and
23 I paid a broker of --

24 Q. Through that process you made an investment decision that
25 weighed the risks and benefits, correct?

E79JTRU1

Peresechensky - cross

1 THE COURT: Both slow down.

2 MR. PICKHARDT: Yes, your Honor.

3 THE COURT: Slow down.

4 BY MR. PICKHARDT:

5 Q. The next day, on September 28th, as you testified, you had
6 the phone call with Mr. Haghighat at Mesirow, in which he
7 agreed to purchase the bond for \$49.50, right?

8 A. Correct.

9 THE COURT: Didn't we cover this yesterday?

10 MR. PICKHARDT: Yes, your Honor. I am covering one
11 piece.

12 BY MR. PICKHARDT:

13 Q. I believe you testified yesterday that you had the phone
14 call with him, and then 10 minutes later he came back and told
15 you he wanted to cancel the trade because he realized there was
16 a problem. Is that right?

17 A. I believe so.

18 Q. It took Mr. Haghighat at Mesirow 10 minutes to figure out
19 that this bond was a problem, right?

20 MR. ROLLIN: Objection; speculation.

21 THE COURT: Sustained.

22 A. Yeah, yeah.

23 THE COURT: Don't answer. "Sustained" means don't
24 answer.

25 BY MR. PICKHARDT:

E79JTRU1

Peresechensky - cross

1 Q. When you decided to let Mr. Haghighat cancel that trade,
2 you were not relying on the statements of Wells Fargo or
3 anybody else, right?

4 A. I wasn't aware of any statement of Wells Fargo at that
5 time.

6 Q. Now, on September 28th when you let Mr. Haghighat out of
7 the trade that you had agreed to, you had made the day before a
8 trade with Nomura Securities for your firm Semper to purchase
9 the bond, right?

10 A. That's correct.

11 Q. The typical terms for a trade is that the trade occurs on
12 one date and then the settlement of the trade occurs usually
13 three days later, right?

14 A. Correct.

15 Q. So at this point in time after you had that communication
16 with Mr. Haghighat, he had indicated he believed that the 1-A-3
17 was junior to the 1-A-2, the status of your trade at that point
18 with Nomura was that you had executed the trade but it had not
19 yet settled, right?

20 A. I must make a statement that he didn't, he didn't
21 specifically state he believed -- he just stated in a chat that
22 1-A-3 is junior and he used the language because he wanted to
23 get out of the trade.

24 But to answer your question, there was no possibility
25 of me getting out of the trade with Nomura because it had

E79JTRU1

Peresechensky - cross

1 already been a day after the trade had --

2 Q. Mr. Peresechensky, I am asking you a different question.

3 THE COURT: Yes, we know the settlement date varies
4 from the trade date, but Mr. Peresechensky anticipated the
5 question and answered it. Move on.

6 BY MR. PICKHARDT:

7 Q. The settlement had not yet occurred. What I want to
8 understand is that after that communication with Mr. Haghighat,
9 and the court can review it, we have it in documentary form --

10 THE COURT: I have it.

11 Q. -- you did not go back to Nomura to ask Nomura if they
12 would let you in turn, cancel your trade, right?

13 A. I did not go back to Nomura.

14 Number one, there was no possibility of canceling the
15 trade after it had been consummated. The day after the trade,
16 there is no way they would let me out of the trade.

17 Second of all, I felt confident in my analysis when I
18 bought it at 47 and a half, and also my analysis was validated
19 by the second-best bid or covers at 47. At that point I had
20 absolutely no intention of going to Nomura to try to get out of
21 the trade.

22 Q. Because there was a very tight cover. That is what you
23 testified, right, there was a bid at almost the exact same
24 price you bid?

25 A. Nomura told me it was 47.

E79JTRU1

Peresechensky - cross

1 Q. You bid at 47 and a quarter, very close?

2 A. Yes.

3 Q. You chose not to go back to Nomura to see whether they
4 would be willing to talk to the seller and see if they would
5 transfer the trade to somebody else who was willing to pay
6 virtually the same price?

7 A. I did not.

8 Q. Part of the reason you didn't do that as you just testified
9 is because in your view, the indenture was the controlling
10 document, right?

11 A. It was, yes, it was in my view, indenture was the
12 controlling document and my next thought at that time was to
13 verify the loss allocation with the securities administrator.

14 Q. When you made that decision not to go back to Nomura
15 because you thought the indenture was the controlling document,
16 that decision was not based on a statement by Wells Fargo, was
17 it?

18 A. I did not have any communication with Wells Fargo at that
19 time.

20 Q. That next week you had some communications with Wells
21 Fargo, and you did some further investigation with respect to
22 this discrepancy, right?

23 A. That's correct.

24 Q. You testified yesterday about the fact that you had
25 reviewed the indenture prior to making your purchase on

E79JTRU1

Peresechensky - cross

1 Thursday, September 27th. Now, I want to ask you some
2 questions about that.

3 You're familiar with a person by the name of James
4 Cognetti, right?

5 A. James --

6 THE COURT: Why not just answer yes?

7 THE WITNESS: Yes.

8 BY MR. PICKHARDT:

9 Q. He was at a broker-dealer named CRT, right?

10 A. Yes.

11 Q. Mr. Cognetti was your sales coverage at CRT, and you were a
12 client of his, correct?

13 A. That's correct.

14 Q. Mr. Cognetti is someone who you spoke with about the
15 discrepancy between the 1-A-3 and 1-A-2 bond, right?

16 A. Yes.

17 Q. And Mr. Cognetti is someone who had access to transactional
18 documents for deals, right?

19 A. Yes.

20 THE COURT: Is that so? Why was that so?

21 THE WITNESS: I know he had access to transactional
22 documents because he had Intex. He had the Intex application.
23 I didn't have the Intex application.

24 THE COURT: Intex gives you access to transactional
25 documents?

E79JTRU1

Peresechensky - cross

1 THE WITNESS: You have both in indenture and Intex.

2 BY MR. PICKHARDT:

3 Q. I am showing you a document that has been marked as Exhibit
4 TX-227.

5 A. Yes.

6 Q. This is an e-mail from Mr. Cagnetti to yourself, dated
7 Monday, October 1st, 2012?

8 A. Correct.

9 Q. Correct?

10 A. Yes.

11 MR. PICKHARDT: I will ask Exhibit TX-227 be admitted
12 into evidence.

13 MR. ROLLIN: No objection.

14 THE COURT: This is what is on the screen?

15 MR. PICKHARDT: Yes, your Honor. It also has an
16 attachment.

17 THE COURT: May I see it? Next. Any other pages?
18 What is this, the indenture?

19 MR. PICKHARDT: Yes, your Honor.

20 THE COURT: Why are you offering it?

21 MR. PICKHARDT: Excuse me?

22 THE COURT: Why is it being offered?

23 MR. PICKHARDT: It is being offered to demonstrate
24 Mr. Peresechensky received a copy of the indenture by e-mail
25 from Mr. Cagnetti, who was his sales coverage several days

E79JTRU1

Peresechensky - cross

1 after Mr. Peresechensky is indicating he had already downloaded
2 the document from Bloomberg.

3 THE COURT: What do you bring out by that? Why is
4 that relevant?

5 MR. PICKHARDT: Because, your Honor, at deposition
6 Mr. Peresechensky testified that the only reason he would be
7 getting a transactional document from Mr. Cagnetti is if he
8 wasn't, didn't think he had access to it otherwise.

9 We have testimony from Mr. Peresechensky that he
10 reviewed this document because he found it in a place he had
11 never found a document before several days earlier as part of
12 his due diligence on this deal. In his deposition he was asked
13 about Mr. Cagnetti and the circumstances in which Mr. Cagnetti
14 would be sending him a document, and his testimony was:

15 "Q Question --

16 THE COURT: No. You say you received a copy of the
17 trust indenture simply by clicking on a Bloomberg link, right?

18 THE WITNESS: Yes.

19 THE COURT: Did you do that before Monday, October 1?

20 THE WITNESS: Sorry?

21 THE COURT: Before Monday, October 1?

22 THE WITNESS: I reviewed the indenture on the date of
23 the purchase, on September 27th.

24 THE COURT: What was the purpose of getting this one
25 from Cagnetti?

E79JTRU1

Peresechensky - cross

1 THE WITNESS: I can explain the story behind this.

2 THE COURT: Just give me that answer.

3 THE WITNESS: I just want to rehash the sequence of
4 events leading up to this context. Mr. Pickhardt, you are well
5 aware there was a bid list on AHMIT September 27. I noticed
6 abnormal in the nomenclature. I looked at Bloomberg and
7 Bloomberg confirmed --

8 THE COURT: Slow, slow, slow.

9 THE WITNESS: Bloomberg, S&Ped confirm seniority of
10 1-A-3 relative to 1-A-2. I then noticed a trust indenture
11 right on the first page of Bloomberg filing documents, and I
12 downloaded the trust indenture to verify the loss allocation
13 loss and different Section 3.38 unequivocally stated losses
14 would be applied first to 1-A-2 then 1-A-3.

15 Then I proceeded to analyze the security proprietary
16 loan level credit model and third party credit models from JP
17 Morgan, and I came up with a price of 47 and an 8th. Two hours
18 later Nomura came back and said it can be done. I said time
19 passed when I bid on other bonds. I thought my bid was a bit
20 low, so I didn't expect to get hit on my bid.

21 THE COURT: You had a long, long story.

22 THE WITNESS: I will get to the point.

23 THE COURT: Don't get to it. Why are you getting this
24 one if you already had it?

25 THE WITNESS: Here is what drove my thinking. When I

E79JTRU1

Peresechensky - cross

1 spoke to Mr. Ali, that is the first time I became aware of the
2 discrepancy on Friday afternoon, September 28th. Although the
3 indenture clearly stated the losses will be applied to 1-A-3
4 before 1-A-2, I wanted to do legal work.

5 I wanted to do some search over the weekend about any
6 other cases where there is a discrepancy between indenture PSA
7 and ProSupp, and during my search I uncovered a case where
8 Citigroup sued Impact over I believe it was the Impact 073
9 deal.

10 MR. PICKHARDT: Objection; nonresponsive.

11 THE COURT: We'll find out. He is taking a long time
12 to answer. Go ahead. Why did you ask Cognetti?

13 THE WITNESS: I will get to it.

14 THE COURT: Tell me now. Don't get to it. Why did
15 you ask Cognetti?

16 THE WITNESS: In that Impact case, it was similar to
17 this case, in my view, because there was a discrepancy between
18 a PSA controlling document and ProSupp. In that case --

19 THE COURT: Excuse me.

20 Did you hear the question?

21 THE WITNESS: I did.

22 THE COURT: I don't need the whole process of
23 reasoning. What was the specific reasoning you asked Cognetti
24 for the trust indenture if you already had the indenture?

25 THE WITNESS: In that Impact case there were two

E79JTRU1

Peresechensky - cross

1 controlling PSA, one which was incorrect PSA and --

2 THE COURT: You wanted to see if there was another
3 version?

4 THE WITNESS: Yes.

5 THE COURT: That is why you got this?

6 THE WITNESS: That is why I got this indenture.

7 THE COURT: I'll receive it in evidence.

8 (Plaintiff Exhibit TX-227 received in evidence)

9 BY MR. PICKHARDT:

10 Q. Mr. Peresechensky, you were deposed in this matter on June
11 26th?

12 A. Correct.

13 Q. A few days ago, correct?

14 A. Yes.

15 Q. You were asked questions about why you got this indenture
16 from Mr. --

17 A. Exactly.

18 THE COURT: Mr. Pickhardt, there is a form for doing
19 it. Follow the form.

20 BY MR. PICKHARDT:

21 Q. Mr. Peresechensky, in your deposition were you asked the
22 following questions and --

23 THE COURT: What page?

24 MR. PICKHARDT: It is on Page 174, your Honor,
25 starting at Line 3.

E79JTRU1

Peresechensky - cross

1 THE COURT: How many lines are you reading to him?

2 MR. PICKHARDT: Through 18, your Honor.

3 THE COURT: All right. Go ahead.

4 BY MR. PICKHARDT:

5 Q. Mr. Peresechensky, were you asked the following questions
6 and did you provide the following answers:

7 THE COURT: Break it up.

8 MR. PICKHARDT:

9 "Q Do you have a recollection why Mr. Cognetti was sending you
10 the AHMIT 05-2 indenture?

11 "A I don't know."

12 Did you provide that testimony?

13 A. I did. I didn't remember at the time of my deposition.

14 Q. Did you provide the following testimony:

15 "Q Do you have any recollection of having any discussion with
16 Mr. Cognetti about AHMIT 05-2 around the time you heard from
17 Mr. Ali Haghighat about the discrepancy between the indenture
18 and the ProSupp?

19 "A I possibly could have talked to him about the discrepancy
20 of the indenture as the one loss allocation provision versus
21 the ProSupp. It is possible I had talked to him about it."

22 Did you provide that testimony?

23 A. Yes.

24 "Q And, in fact, did you ask Mr. Cognetti to send you a copy
25 of the indenture?

E79JTRU1

Peresechensky - cross

1 "A I don't believe I did. I don't remember if I did. I mean
2 I don't know why I would ask him if I can get it from
3 Bloomberg."

4 Did you provide that testimony, sir?

5 A. Yes.

6 MR. ROLLIN: As to the rule of completeness, I believe
7 it should be read through 176, Line 21.

8 THE COURT: Denied. You can take it up on redirect
9 examination.

10 MR. ROLLIN: Thank you.

11 BY MR. PICKHARDT:

12 Q. Mr. Peresechensky, you testified yesterday that based upon
13 your understanding --

14 THE COURT: When was his deposition?

15 MR. PICKHARDT: Excuse me?

16 THE COURT: When was the deposition?

17 MR. PICKHARDT: The deposition was June 26th, your
18 Honor, so --

19 THE COURT: This year?

20 MR. PICKHARDT: Excuse me?

21 THE COURT: This year, 2014?

22 MR. PICKHARDT: Correct, of this year.

23 THE COURT: Thank you.

24 BY MR. PICKHARDT:

25 Q. Mr. Peresechensky, you provided testimony yesterday in

E79JTRU1

Peresechensky - cross

1 which you stated that Intex, which you admitted the industry
2 standard cash flow tool models securities using the indenture
3 as a rule, right?

4 A. Yes.

5 Q. Isn't it true that Intex for the first six years of this
6 transaction modeled it based upon the prospectus supplement?

7 A. I don't have the knowledge of that at the time. I didn't
8 have access to Intex because I didn't have the Intex
9 application. Intex as a policy models the cash flows per
10 indenture. Now there might -- if they haven't caught it yet,
11 then it is something that needs to be addressed with Intex. As
12 a policy, they model deals per indenture.

13 THE COURT: The question was whether Intex for the
14 first six years of this transaction modeled based upon the
15 prospectus supplement?

16 THE WITNESS: I think the change occurred.

17 THE COURT: Is it yes or no?

18 THE WITNESS: The change occurred --

19 THE COURT: Is it yes or no, the first six years, or
20 do you know?

21 THE WITNESS: The change occurred on February 2011, so
22 it would be slightly less than six years.

23 THE COURT: The first five years?

24 THE WITNESS: Yes.

25 THE COURT: Modeled on the ProSupp?

E79JTRU1

Peresechensky - cross

1 THE WITNESS: Yes.

2 THE COURT: And it changed and became modeled on the
3 trust indenture?

4 THE WITNESS: Correct.

5 THE COURT: When did you find that out?

6 THE WITNESS: When did I find it out?

7 I found it out through Ali because I didn't have
8 access to Intex.

9 THE COURT: Through Ali?

10 THE WITNESS: Ali, a trader at Mesirow.

11 THE COURT: When did you find it out?

12 THE WITNESS: I believe I found it it out on Friday,
13 September 28th.

14 THE COURT: Right after you did the deal?

15 THE WITNESS: Yes.

16 BY MR. PICKHARDT:

17 Q. Mr. Peresechensky, isn't it also true that for the first
18 five or six years of this deal, as we saw on documents
19 yesterday, that both Moody's and Standard & Poor's follow the
20 prospectus supplement?

21 A. Yeah, I believe the changes were, Moody's changed the
22 methodology in 2010, and S&P likewise sometime in 2011.

23 Q. You testified yesterday that you understood yourself to
24 have received certain assurances from Wells Fargo in October of
25 2012 with respect to whether what Wells Fargo would or wouldn't

E79JTRU1

Peresechensky - cross

1 do, right?

2 A. Yes.

3 Q. Is it correct when you received what you understood to be
4 these assurances, that you did not at that time consult with
5 Ms. Davis, Semper's in-house lawyer?

6 A. I did not consult with Ms. Davis. I am not really sure if
7 Ms. Davis was in-house or out-house. I didn't have a
8 communication channel to Ms. Davis. I usually talked to my
9 boss -- Jaime Nosey, who is a CIO, chief investment officer, or
10 Greg Ellis, president.

11 THE COURT: The question was whether you consulted
12 with Ms. Davis?

13 THE WITNESS: I did not.

14 THE COURT: That is the answer.

15 BY MR. PICKHARDT:

16 Q. And so I also want to make sure, you said earlier in
17 response to one of my prior questions that there was legal
18 analysis being performed around this time. You're not talking
19 about legal analysis being performed by a lawyer, right?

20 A. Around September and October of 2012?

21 Q. Yes.

22 A. No. It was legal research, looking at the deals that
23 had --

24 THE COURT: It was your looking?

25 THE WITNESS: I was looking.

E79JTRU1

Peresechensky - cross

1 BY MR. PICKHARDT:

2 Q. Now, that was in October of 2012.

3 You also testified yesterday that there were then
4 events in 2013 in which the securities administrator's position
5 was clarified, right?

6 A. There were events, further communications between Wells
7 Fargo and other note-holders.

8 Q. And specifically the events I'm talking about are in May of
9 2013 Wells Fargo sent around a consent solicitation, and that
10 consent solicitation included a specific reservation of rights
11 that Wells Fargo might take legal action even if consent was
12 not provided for an amendment, right?

13 A. Correct.

14 Q. And in response to that, which raised concern for you,
15 Semper sent an angry letter to Wells Fargo, right?

16 A. Yeah, I believe somebody at Semper sent a letter.

17 Q. In response to your angry letter, Wells Fargo at the end of
18 of May 2013 sends a letter back in which they confirm their
19 reservation of rights that they could bring legal action,
20 right?

21 MR. ROLLIN: Objection.

22 THE COURT: What grounds?

23 MR. ROLLIN: Best evidence.

24 THE COURT: Sustained. Are these letters in evidence?

25 MR. PICKHARDT: They are, your Honor.

E79JTRU1

Peresechensky - cross

1 THE COURT: Why do we need them?

2 MR. PICKHARDT: We don't, your Honor.

3 THE COURT: Then don't bother.

4 BY MR. PICKHARDT:

5 Q. Mr. Peresechensky, as of May 2013 in the correspondence you
6 received from Wells Fargo at that time and in the next couple
7 of months, you were no longer under any misapprehension that
8 Wells Fargo had not reserved its rights to pursue legal action,
9 right?

10 A. When we received --

11 THE COURT: What is the difference?

12 MR. PICKHARDT: Your Honor, I want to make sure we
13 have a timeline because there are --

14 THE COURT: You have it in the documents. You don't
15 need it from the witness. I think you are pretty much finished
16 with Mr. Peresechensky.

17 MR. PICKHARDT: If I can confirm there is anything
18 else I would like to wrap up on.

19 THE COURT: Sure.

20 THE COURT: Why don't you consult your colleagues.

21 (Off-the-record discussion)

22 BY MR. PICKHARDT:

23 Q. Mr. Peresechensky, when you testified yesterday, you
24 testified about the fact that you are a regular observer of
25 this market. Based upon your experience, how many actual

E79JTRU1

Peresechensky - cross

1 trades in 1-A-3 notes are you aware of?

2 A. Well, let me qualify first. What do you think is a market
3 in our place?

4 THE COURT: No, Mr. Peresechensky. The question is --

5 THE WITNESS: How many actual trades?

6 THE COURT: That you remember?

7 THE WITNESS: In 1-A-3?

8 THE COURT: Yes.

9 THE WITNESS: The actual trades I know there was a
10 trade on February 2012, around February 23rd, 2012 which I
11 believe was around 37 and a half, and there was our trade on
12 September 27th, 2012.

13 BY MR. PICKHARDT:

14 Q. So you're aware of two actual trades?

15 A. Yes, correct.

16 Q. How many actual trades are you aware of in 1-A-2 notes?

17 A. I am aware of a trade happening in early September 2012 in
18 the low to mid-30's. I don't remember what size exactly. I am
19 aware of a trade on December 12, 2013, 20 million trade from
20 ING. ING list, bond traded around 40, 40 cover.

21 I am also very well aware of a trade on March 6th of
22 this year, 2014, because I was the second-best bid on that
23 bond, on the size slightly less, 200 K when I bid 43, and
24 somebody bid a little bit higher than me.

25 BY MR. PICKHARDT:

E79JTRU1

Peresechensky - cross

1 Q. Mr. Peresechensky, of all of the trades that you are aware
2 of in 1-A-3 notes which have occurred in the last number of
3 years, what is the highest price at which a trade has occurred?

4 A. An actual trade?

5 Q. An actual trade?

6 What is the highest price you are aware of of somebody
7 having actually purchased 1-A-3 notes?

8 A. Well, that trade took place in September of 2012.

9 Q. What was the price?

10 A. You know the price, 47 and a half, what we paid for it.

11 Q. Of all of the trades you actually know of in 1-A-2 notes,
12 what is the highest price at which you are aware of anyone
13 having actually purchased 1-A-2 notes?

14 A. We know it was around 43 which happened this year, almost
15 two years later.

16 MR. PICKHARDT: Thank your Honor. I have no further
17 questions.

18 THE COURT: Redirect?

19 MR. JOHNSON: May I have a brief cross?

20 THE COURT: Yes, right.

21 CROSS-EXAMINATION

22 BY MR. JOHNSON:

23 Q. Good afternoon, Mr. Peresechensky.

24 A. Good afternoon.

25 Q. Mr. Peresechensky, I'd like to follow up on some

E79JTRU1

Peresechensky - cross

1 questioning that Mr. Pickhardt just did.

2 You testified in response to his questioning that you
3 received a notice from Wells Fargo in May of 2013 concerning a
4 consent solicitation, correct?

5 A. Correct.

6 Q. And in response to that, Semper sent Wells Fargo an angry
7 letter concerning Wells Fargo's reservation of rights to bring
8 litigation, correct?

9 A. I don't know if, I don't know if it was an angry letter.
10 It was an assertive letter.

11 Q. Your letter objected to --

12 A. It definitely, did, yes.

13 THE COURT: Let him finish his question.

14 BY MR. JOHNSON:

15 Q. Mr. Peresechensky, after Semper objected to Wells Fargo's
16 reservation of rights to bring litigation concerning the
17 discrepancy that brings us to court today, Semper had the
18 opportunity to sell its 1-A-3 notes, correct?

19 A. The liquidity and marketwise, the bond, the bond has been
20 rated compromised. As I stated before, the last observable bid
21 we received on the 1-A-3 note is 71, and I wanted, I wanted to
22 get at least 77 from that bond.

23 Since this trust indenture petition has been filed and
24 the notes are in litigation, I cannot really put, not really
25 sell in good conscience to other investors because the notes

E79JTRU1

Peresechensky - cross

1 are in litigation and the litigation will deter any potential
2 prospective buyers from purchasing the security at what we
3 believe is a fair price.

4 THE COURT: The question was did you have the
5 opportunity to sell your 1-A-3 notes? Did you have an
6 opportunity? Whether you exercised or not, did you have an
7 opportunity?

8 THE WITNESS: I don't believe I had an opportunity to
9 sell them at fair price, what we perceived to be fair price.
10 We had an opportunity to sell them at any price --

11 THE COURT: You had an opportunity to sell at some
12 price?

13 THE WITNESS: At some price.

14 THE COURT: Not a fair price?

15 THE WITNESS: Yes.

16 BY MR. JOHNSON:

17 Q. That price you could have sold at was 71, correct?

18 A. Yes, the last price, 71 in November and December of 2013.

19 Q. So prior to the commencement of this litigation, but after
20 Wells Fargo had clearly indicated it was reserving its rights
21 to bring this litigation, you had an opportunity to sell the
22 bond for 71 in November of 2013, correct?

23 A. Correct.

24 Q. You purchased the bond at 47 and a half, correct?

25 A. Yes, correct.

E79JTRU1

Peresechensky - cross

1 Q. Had you sold the bond in November at 71, Semper would have
2 garnered a significant profit, correct?

3 A. It is significant is a relative term because the market has
4 rated from September 2012 to November of 2013. The market
5 gyrated tremendously. Those bonds were up 40 to 60 percent.
6 Some of them doubled in price. I cannot talk about this in
7 isolation. I have to talked about in context of similar
8 securities have traded. They have gyrated substantially from
9 2012 to 2013.

10 THE COURT: You could have gotten a significant profit
11 on this bond, but you thought not a significant profit in
12 relationship to other activities in the market?

13 THE WITNESS: Correct.

14 THE COURT: If you didn't like this bond, you could
15 have gotten out?

16 THE WITNESS: Yes.

17 THE COURT: If you didn't like what the trustee was
18 doing, you could have gotten out?

19 THE WITNESS: Yes.

20 THE COURT: If you had gotten out, you could have made
21 a profit, but not as big as you wanted?

22 THE WITNESS: Yes.

23 MR. JOHNSON: Thank your Honor. No further questions.

24 THE COURT: It is not important. Next. Redirect.

25 MR. ROLLIN: Before I begin, I object to the previous

E79JTRU1

Peresechensky - cross

1 line of questions and answers because we put Ms. Davis on in
2 part to deal with the equivocal nature of the reservation of
3 rights and the interpretation at Semper with respect to that.

4 THE COURT: Noted. Noted. Noted. Continue.

5 REDIRECT EXAMINATION

6 BY MR. ROLLIN:

7 Q. Mr. Peresechensky, did you know this litigation would be
8 filed before it was filed?

9 A. No.

10 Q. Was it a surprise to you?

11 A. Absolutely a surprise, shock.

12 Q. Mr. Peresechensky, when we talked about when you spoke with
13 Mr. Pickhardt about gleaning pricing information from the
14 market, are actual trades the only way in which you get pricing
15 information?

16 A. That is just absurd. The market is what some, where
17 somebody is offering the bond and what somebody is paying for
18 the bond. The latest offering was around 77, which I wanted to
19 get for this bond.

20 THE COURT: You speak so fast, we can't hear you or
21 can't understand you.

22 THE WITNESS: What I perceived from the market, what
23 somebody, where somebody is willing to offer the side of the
24 market, in this case case this was 77 offer from us, Semper.

25 And the bid side which was 71, the latest bid side in

E79JTRU1

Peresenchensky - redirect

1 November and December of last year was 71. That was from
2 Oppenheimer and Barclays. This was 71 by 77 market. You could
3 definitely obtain a price of 71, so that would be the market
4 price.

5 I can draw an analogy. Let's say I bought a house for
6 a hundred thousand dollars five years ago, and today somebody
7 offered to pay me 200,000 for that house, and I decided not to
8 sell that house because I want more. That doesn't mean the
9 house is a hundred thousand from the last observable
10 transaction five years ago? That is absurd. The market is
11 basically the offer side which was 77 and bid side 71. That
12 was the market on 1-A-3 tranche. It is not based on the last
13 observable transaction price.

14 THE COURT: It depends on when that is?

15 THE WITNESS: Yes.

16 THE COURT: If it at or around the same time as the
17 bids and asked, you would consider it part of the market,
18 right?

19 THE WITNESS: Yes.

20 THE COURT: If it is separated much in time, then it
21 is not part of the market?

22 THE WITNESS: Right.

23 THE COURT: It all depends.

24 BY MR. ROLLIN:

25 Q. Mr. Peresechensky, you were questioned by Mr. Pickhardt

E79JTRU1

Peresenchensky - redirect

1 about effectively whether or not you reviewed the indenture on
2 Bloomberg before the trade. Do you remember those questions?

3 A. Yes, correct.

4 Q. Mr. Peresechensky, I have handed you what is marked for
5 identification as Exhibit 262. Please take a look at that.

6 A. Yes.

7 THE COURT: Put it up, please.

8 BY MR. ROLLIN:

9 Q. Can you tell the court, please, what Exhibit TX-262 is.

10 A. Yes, that is a list of files for this AHMIT American Home
11 deal. If you look at Line 14, it shows the trust indenture is
12 very visible there among filings and it was filed on Bloomberg
13 sometime in May of 2011.

14 Q. Is that the screen view that you had at the time that you
15 looked up this bond on Bloomberg before making a purchase?

16 A. Yeah.

17 MR. PICKHARDT: Objection, your Honor. This is not in
18 evidence.

19 MR. ROLLIN: I'll lay a foundation.

20 THE COURT: That is okay. The answer, is it a screen
21 that he looked at when he looked at the Bloomberg screen. What
22 is next? We are waiting for a question.

23 BY MR. ROLLIN:

24 Q. Where it says trust indenture, is that the link to the
25 trust indenture you testified about?

E79JTRU1

Peresenchensky - redirect

1 A. Yeah. So if you --

2 THE COURT: You answered the question.

3 BY MR. ROLLIN:

4 Q. Did you click on that link before you bought the bond?

5 A. Yes.

6 Q. Did you look at the trust indenture?

7 A. Yes.

8 Q. Did you look at Section 3.38?

9 A. Yes.

10 THE COURT: He has already said that.

11 BY MR. ROLLIN:

12 Q. You were asked questions at your deposition about the

13 e-mail from Mr. Cognetti, correct?

14 A. Correct.

15 Q. At the time of your deposition, were you unable to remember
16 that?

17 A. I didn't remember why he sent me that e-mail because I
18 already had the trust indenture from Bloomberg.

19 Q. Did you tell counsel at the time you didn't remember it?

20 A. I am sorry?

21 Q. Did you tell Mr. Pickhardt at the time of the deposition
22 that you did not remember why Mr. Cognetti would have been
23 sending you that document?

24 A. I believe I stated why I didn't remember. I said I don't
25 recall why he sent me the document.

E79JTRU1

Peresenchensky - redirect

1 Q. After your deposition, was it troubling you you couldn't
2 remember that?

3 A. It was, definitely was troubling me and I came to you
4 after --

5 Q. Don't say what you told me.

6 A. Okay.

7 Q. Did you scour your memory and try to remember what
8 happened?

9 A. Yes, I did, yes.

10 Q. Is your memory you testified about today that the --

11 A. Yes, I had that recollection on the same day or after
12 the -- yeah.

13 Q. Did you accurately testify today what your recollection
14 was?

15 A. I believe so.

16 (Off-the-record discussion)

17 BY MR. ROLLIN:

18 Q. You were asked questions about your visibility into pricing
19 for both the A-2 and A-3 notes. Do you have a view of the
20 current market value of the A-2 notes?

21 A. Yes, I have a very good view because when I actually
22 analyzed ING's transaction from December 2012, when the price
23 was 40, I saw the price, how cheap the bond was. I didn't
24 assign any probability --

25 Q. You did not?

E79JTRU1

Peresenchensky - redirect

1 A. -- I didn't assign any probability for indenture to be
2 changed to ProSupp. When I got a chance to bid on that 1-A-2
3 bond again because it was a small size in March, I stepped up
4 several times to try to acquire a piece less than 200,000.

5 THE COURT: Acquire what?

6 THE WITNESS: I tried to acquire the 1-A-2 tranche at
7 a price up to 43, \$43.

8 THE COURT: What happened?

9 THE WITNESS: Somebody outbid me.

10 MR. ROLLIN: No further questions.

11 THE COURT: Thank you.

12 MR. PICKHARDT: Your Honor, just one question?

13 THE COURT: Go ahead.

14 RECROSS EXAMINATION

15 BY MR. PICKHARDT:

16 Q. Mr. Peresechensky, if you could please look back at Exhibit
17 262 which Mr. Rollin showed you.

18 A. Yes.

19 Q. You testified that this document accurately reflects the
20 Bloomberg screen that you looked at and found the indenture on,
21 right?

22 A. It was similar to this screen. I don't remember if the
23 dates were exactly the same. I remember the trust indenture
24 was on the first page of that screen.

25 Q. This says company filings, and what page does this appear

E79JTRU1

Peresecensky - recross

1 on?

2 A. It was --

3 Q. I want you to read what it says in the upper-right-hand
4 corner with respect to the page, Mr. Peresechensky.

5 A. Mr. Upper-right corner?

6 Q. Next to --

7 THE COURT: Draw it to his attention. What page is
8 it?

9 MR. PICKHARDT: It is on this Exhibit 262 in the
10 upper-right-hand corner.

11 THE COURT: Page 3?

12 MR. PICKHARDT: Correct.

13 THE COURT: Mr. Pickhardt is drawing to your attention
14 that this screen is Page 3.

15 THE WITNESS: Page 3.

16 THE COURT: Yes. Do you see that, Page 3, company
17 filings?

18 THE WITNESS: Page 3? Yes, yes. Because we looked at
19 the current, as two years have passed, there have been more
20 files. At the time of, at the time I looked at the deal, I
21 remember it was on the first page.

22 BY MR. PICKHARDT:

23 Q. This exhibit doesn't accurately reflect what you looked at
24 at the time?

25 THE COURT: That is objectionable. Objection

E79JTRU1

Peresecensky - recross

1 sustained.

2 MR. PICKHARDT: No further questions.

3 THE COURT: You're excused.

4 (Witness excused)

5 THE COURT: Next. Mr. Rollin?

6 MR. ROLLIN: We rest.

7 THE COURT: Anything more from the --

8 MR. PICKHARDT: No, your Honor.

9 THE COURT: Anything more from Wells Fargo?

10 MR. JOHNSON: No, your Honor.

11 THE COURT: All sides rest.

12 All motions previously made by any party are deemed
13 made now and the argument will be incorporated in the final
14 arguments.

15 MR. PICKHARDT: I have one housekeeping issue.

16 I believe I'll need to confirm with my team there were
17 three exhibits which inadvertently did not get admitted. I
18 don't know when you would like us to address that?

19 THE COURT: Yes, do it now.

20 (Pause)

21 MR. PICKHARDT: Your Honor, the first two exhibits are
22 Exhibits TX-205 and Exhibit TX-206. These are documents that
23 related to the drafting process and specifically drafts with
24 respect to the term sheets which your Honor will recall there
25 was testimony.

E79JTRU1

Peresecensky - recross

1 THE COURT: I do recall. I thought they were in. If
2 they're not in and you offer them, is there any objection?

3 MR. ROLLIN: Yes, your Honor. I interposed objections
4 with respect to these draft documents on hearsay and --

5 THE COURT: Put up 205, please. These are comments by
6 others in the drafting process?

7 MR. PICKHARDT: These are comments that were received
8 by Ms. Stone, as she testified about.

9 THE COURT: Based on these comments, she produced the
10 next draft?

11 MR. PICKHARDT: That's correct.

12 THE COURT: And there is no issue whether comments
13 were taken up or not. The next draft in terms of the
14 distribution of losses is exactly the same as the first, prior
15 draft?

16 MR. PICKHARDT: Not exactly, your Honor.

17 There was a comment that came from Thacher Proffitt in
18 the comments that are attached here which asked that Lehman
19 Brothers elaborate with respect to the discussion of allocation
20 of losses, and in the next draft within that elaboration is
21 further discussion and description of the allocation of
22 realized losses specifically with respect to the 1-A-2 and
23 1-A-3, and so it is not simply a repetition of what had been
24 the previous draft, but actually addition of more description
25 of that allocation.

E79JTRU1

Peresecensky - recross

1 THE COURT: Who was the witness who put this on?

2 MR. PICKHARDT: Ms. Stone.

3 THE COURT: So she was testifying in her records?

4 MR. PICKHARDT: That's correct, your Honor, the
5 documents she received. I am offering them for sequence just
6 so we have a sequence of the drafting.

7 THE COURT: What is the objection?

8 MR. ROLLIN: The objection is that she specifically
9 stated she could not authenticate any of the documents or any
10 of the revisions to the documents.

11 THE COURT: They came from her files.

12 MR. ROLLIN: It no evidence they came from her files.

13 THE COURT: Can you tell from the production number?

14 MR. ROLLIN: Sorry?

15 THE COURT: Can you tell from the production number?

16 MR. ROLLIN: I have a declaration from --

17 THE COURT: The production from LEM.

18 MR. ROLLIN: L E H, Lehman. The parties previously
19 agreed to a declaration from Lehman Brothers concerning these
20 documents which I, as part of the housekeeping at the end, tend
21 to offer. It was also negotiated and agreed upon by the
22 parties, and it explains the documents that came from Lehman
23 Brothers and it is very important to the court's analysis on
24 this issue. Your Honor should see Lehman Brothers evidence in
25 that regard.

E79PTRU2

Trial

1 THE COURT: Let me see.

2 MR. ROLLIN: May I approach?

3 THE COURT: Yes.

4 MR. ROLLIN: This will be TX9. It's an agreed joint
5 exhibit.

6 THE COURT: Mr. Rollin, what can I understand from
7 this?

8 MR. ROLLIN: Your Honor, paragraph 9, in particular,
9 Lehman says -- the Lehman representative says: I am informed
10 that many of the documents in the LBHI production are drafts
11 and may reflect handwritten notes or electronic note taking and
12 change track in functionality. LBHI does not have information
13 sufficient to state who made any such notes or changes, the
14 reason for any such changes, or when such notes or changes were
15 made.

16 THE COURT: Well, I can take 205 and 206 in the
17 sequence in which they came because it could be reconstructed.
18 I'll receive 205, 206 and TX9 in evidence.

19 MR. ROLLIN: Thank you.

20 (Defendant's Exhibits 205, 206 and TX9 received in
21 evidence)

22 MR. PICKHARDT: Your Honor, the other document was
23 TX220, which was the final offering memorandum in connection
24 with this deal. And to be clear, the offering memorandum is
25 distinct from the Prospectus Supplement. The offering

E79PTRU2

Trial

1 memorandum is for some of the privately issued notes. It also
2 includes --

3 THE COURT: What's the relevance?

4 MR. PICKHARDT: It includes a description of the
5 allocation of losses between the 1-A-3 and the 1-A-2 notes and
6 is part of the final documents.

7 THE COURT: I'll receive the note.

8 (Plaintiff's Exhibit TX220 received in evidence)

9 MR. ROLLIN: Your Honor, we don't object to the final
10 documents, but it only describes the indenture and, therefore,
11 is subject to the best evidence rule.

12 THE COURT: Well, that is the best evidence.

13 MR. ROLLIN: The indenture.

14 THE COURT: It is part of the closing binder. It's
15 part of the materials that are used to understand the deal. I
16 receive it all. Okay. Who's going to go first?

17 MR. JOHNSON: Your Honor, may I ask one thing before
18 we move to closings? This just pertains to scheduling. If I
19 understood your Honor yesterday, the Court's intention is to
20 announce the decision tomorrow morning. Unfortunately, your
21 Honor, that presents a significant scheduling conflict for me.

22 THE COURT: Let's do this off the record.

23 MR. JOHNSON: Okay.

24 (Discussion off the record)

25 THE COURT: So I had scheduled tomorrow morning as the

E79PTRU2

Trial

1 time to deliver the Court's decision in the case. That is now
2 postponed until 2:15 -- let's say 2:30 on Friday.

3 MR. JOHNSON: Thank you, your Honor.

4 THE COURT: 2:30 on Friday. Okay. Are you ready for
5 summations?

6 MR. PICKHARDT: Yes, we are, your Honor.

7 THE COURT: Okay. Are you going to start?

8 MR. PICKHARDT: Yes, your Honor.

9 THE COURT: What's the plan?

10 MR. PICKHARDT: Well, your Honor, it wasn't completely
11 clear to me yesterday as to whether the Court would allow us to
12 reserve a period for rebuttal following --

13 THE COURT: Yes, you have your hour.

14 MR. PICKHARDT: Can we split our hour?

15 THE COURT: You can split your hour any way you want.

16 MR. PICKHARDT: Okay. Then if we could please split
17 our hour, we'll go for about 50 minutes. Frankly, I think,
18 your Honor, it will be less than that.

19 THE COURT: Let's say 45, 15.

20 MR. PICKHARDT: 45, 15 would be good, your Honor.

21 THE COURT: And that would assign Mr. Johnson time as
22 well.

23 MR. JOHNSON: Your Honor, there will be no closing on
24 behalf of the securities administrator.

25 THE COURT: I want to make sure I have the notices.

E79PTRU2

Trial

1 Mr. Pickhardt is going to pick up the notices.

2 MR. JOHNSON: The notices, your Honor, from 2013
3 concerning the consent solicitation in which Wells Fargo
4 reserved its rights?

5 THE COURT: The beginning of the lawsuit, the notice
6 that you were beginning the lawsuit in Minnesota.

7 MR. JOHNSON: Yes, your Honor. I don't think those
8 have been offered into evidence.

9 THE COURT: It should be.

10 MR. JOHNSON: Okay. Well, then, your Honor --

11 THE COURT: They were joint exhibits. I said that I
12 would receive the joint exhibits.

13 MR. JOHNSON: Your Honor, they are not joint exhibits.
14 They are actually Exhibits 101, 102, 103 and 104.

15 THE COURT: I would like you to take five minutes.
16 I'll receive those in evidence, and I'd like you to take five
17 minutes on your own time to develop that, and like you to do it
18 first.

19 (Plaintiff's Exhibits 101, 102, 103 and 10 received in
20 evidence)

21 MR. JOHNSON: I'm sorry, to develop?

22 THE COURT: To tell me what happened. I want to see
23 the sequence of events. I want to examine the letters. I've
24 not seen them or focused on them.

25 MR. JOHNSON: Yes, your Honor.

E79PTRU2

Summation - Mr. Johnson

1 THE COURT: You will go first on your own time. Off
2 the record.

3 (Discussion off the record)

4 THE COURT: Okay.

5 MR. JOHNSON: May it please the Court. Your Honor,
6 again, Michael Johnson on behalf of the securities
7 administrator. I will briefly address the sequence of events
8 that occurred at the beginning of this year when Wells Fargo
9 commenced this action and the notice that was provided to
10 investors in this action at that time.

11 Wells Fargo commenced a trust instruction proceeding
12 in Minnesota State Court on January 17th, 2014. In its
13 petition, Wells Fargo sought relief. In the alternative, it
14 sought an order either confirming the existing loss allocation
15 as appears in the indenture or, alternatively, that the loss
16 allocation appearing in the indenture be reformed so as to
17 conform to the sequence of loss allocation in the Pro Supp.

18 On January 27 --

19 THE COURT: In other words, taking a position
20 favorable to neither side, simply saying just tell me how to go
21 and I'll go?

22 MR. JOHNSON: Correct, your Honor. And that was a
23 filing that was made pursuant to Minnesota statute that permits
24 a trustee or other interested party to commence an action
25 seeking judicial guidance in respect of a trust instrument,

E79PTRU2

Summation - Mr. Johnson

1 which this indenture is, of course.

2 On January 27th, your Honor, the securities
3 administrator caused to be delivered to holders, a notice
4 informing holders of the commencement of the trust instruction
5 petition. That notice appears at Exhibit 101, TX101. Your
6 Honor, in that exhibit, the securities administrator notified
7 investors of the commencement of the action and included a copy
8 of the petition.

9 And the securities administrator further advised
10 investors of the scheduling of a hearing by the Minnesota State
11 Court. Of course, your Honor, that hearing never did occur,
12 but we did inform investors when it was scheduled at the time.

13 THE COURT: Didn't occur because the case was removed.

14 MR. JOHNSON: That's correct, your Honor, and that,
15 your Honor, is effectively what the subsequent notices that
16 have been admitted into evidence show. On February 20th, 2014,
17 the securities administrator caused to be delivered to
18 investors a notice informing investors that the action had been
19 removed to Federal District Court for the District of
20 Minnesota. That removal was affected by Scepter, a party in
21 interest here today, your Honor.

22 THE COURT: Did Scepter intervene before it removed?

23 MR. JOHNSON: Your Honor, I'm not sure if it was a
24 formal intervention because it was a matter of state court
25 procedure. I think I'm understanding from counsel for Scepter

E79PTRU2

Summation - Mr. Johnson

1 that it was a formal intervention. It did certainly appear as
2 a party in interest, and according to Minnesota procedure, a
3 party in interest is entitled to appear in a trust instruction
4 proceeding. And there was certainly no objection on the part
5 of the securities administrator to Scepter's appearance in the
6 action.

7 A copy of that notice informing investors of the
8 removal of the action to Minnesota District Court is
9 Exhibit TX102.

10 THE COURT: May I see it?

11 MR. JOHNSON: Yes, and a copy of the notice of removal
12 here is at Page 8 of Exhibit 102. And, your Honor, to follow
13 through, there was, I believe, in this notification -- yes, if
14 you turn to Page 4, your Honor --

15 THE COURT: One minute, one minute. Okay.

16 MR. JOHNSON: Page 4, your Honor, the securities
17 administrator did inform investors of a cancellation of the
18 State Court hearing.

19 Your Honor, on March 14th, 2014 --

20 THE COURT: These notices, the two notices, TX101 and
21 102, were they sent to all the note holders?

22 MR. JOHNSON: Your Honor, the manner of delivery is as
23 follows for all of the notices, 101, 102, 103 and 104. This is
24 where the role of the trustee actually comes into play. The
25 securities administrator prepares the notice and delivers the

E79PTRU2

Summation - Mr. Johnson

1 notice to the trustee, which is Deutsche Bank.

2 Deutsche Bank, in turn, delivers the notice through
3 its normal means, which is actually by e-mail in this era, to
4 the Depository Trust Company. The reason that they are
5 delivered to DTC is that DTC is the registered holder for all
6 of the notes. The DTC, in turn, has information about the
7 participant banks at which the actual notes are held, so as to
8 be able to deliver notices out to the participant banks, who,
9 in turn, are able to deliver the notes to the beneficial
10 holders.

11 The securities administrator's procedure also, your
12 Honor, is to post copies of the notices to its own website, and
13 holders of notes in the transaction are entitled to access that
14 website, which has this type of information in it and certain
15 other information in it, most importantly, your Honor, the
16 regular reporting that the securities administrator does for
17 the transaction.

18 THE COURT: Thank you.

19 MR. JOHNSON: On March 14th of 2013, the securities
20 administrator caused to be delivered to holders a further
21 notice, this time notifying investors of the scheduling of a
22 hearing in Minnesota Federal District Court, and that hearing
23 had been scheduled for April 17th, 2014. A copy of that
24 notice, your Honor, is Exhibit TX103.

25 THE COURT: Okay.

E79PTRU2

Summation - Mr. Johnson

1 MR. JOHNSON: And, your Honor, subsequent to the
2 delivery of TX103, this action was transferred to this court,
3 and that transfer was affected pursuant to a stipulation among
4 the interested parties, Scepter and Semper, as well as the
5 securities administrator. And a notice dated April 9th, 2014,
6 which appears as TX104, informed investors of the transfer of
7 this action to this court.

8 THE COURT: Thank you.

9 MR. JOHNSON: And, your Honor, of course, at Page 4 of
10 TX104, the securities administrator informed investors of the
11 cancellation of the hearing that had been scheduled in
12 Minnesota District Court.

13 THE COURT: Thank you.

14 MR. JOHNSON: Unless your Honor has anything further,
15 I will cede to the court.

16 THE COURT: Thank you.

17 MR. JOHNSON: Thank you, your Honor.

18 THE COURT: Okay, Mr. Pickhardt.

19 MR. PICKHARDT: Your Honor, we have some slides that
20 accompany the closing. They will come up on the screen. I
21 also have hard copies, if I could hand them up.

22 THE COURT: Fine. Copies for Mr. Rollin?

23 MR. PICKHARDT: Yes.

24 THE COURT: So it's a quarter past 2:00.

25 MR. PICKHARDT: Your Honor, Mr. Johnson has,

E79PTRU2

Summation - Mr. Pickhardt

1 obviously, explained the context of this proceeding, which is a
2 trust instruction proceeding. The additional point that I
3 would make with respect to the context is that in addition to
4 the action being filed by the trustee, or the securities
5 administrator, in addition, Scepter has filed its own claims
6 that it is entitled to have either the indenture reformed or,
7 separately, a claim that the indenture should be construed so
8 as to interpret it as providing for the allocation of losses to
9 the 1-A-3 notes before the 1-A-2 notes.

10 My intention in closing is to address the evidence
11 that has been offered in support of the claim for reformation.
12 We believe that to have been firmly established. Secondly, to
13 discuss the construction claim, as well, and to explain why we
14 also believe that has been established. And then there have
15 been a number of defenses that have been asserted by Semper,
16 and my intent is to address those defenses.

17 With respect to the affirmative evidence, your Honor,
18 obviously, we've all sat through a couple of days of evidence,
19 and I really don't intend to belabor points that your Honor
20 already understands. And so, you know, if your Honor would
21 like for me to either focus in more detail on particular points
22 or move in a higher gloss over particular areas, I'll certainly
23 be happy to do that.

24 Now, with respect to the reformation claim, which is
25 where I will start, the standard for reformation is that where

E79PTRU2

Summation - Mr. Pickhardt

1 there has been no mistake about the agreements but there has
2 been a mistake with respect to the memorialization of that
3 agreement, then a claim for reformation will stand.

4 Some of the arguments that have been made in defense
5 of this is that reformation just doesn't apply in the indenture
6 context and that simply is not true. And we have identified
7 for you on this slide, and it's included in our papers, the
8 Aristocrat Leisure case, which, in fact, an indenture was
9 reformed, and it is an indenture that, like this indenture, is
10 subject to the Trust Indenture Act.

11 And that case it, frankly, was somewhat similar. What
12 you had was an indenture that had Australian dollars and U.S.
13 dollars, and the indenture had accidentally transposed -- the
14 drafters had actually transposed the references to Australian
15 dollars and U.S. dollars. And what the courts in that case
16 said is where there was no question about that it was in error,
17 is that it was subject to reformation, and that's exactly what
18 they did.

19 THE COURT: Is there an integration clause in this
20 indenture?

21 MR. PICKHARDT: I believe there is. Well, actually,
22 what I would say is I trust that there likely is. I don't have
23 an immediate answer to your question, but we can certainly
24 look.

25 THE COURT: Would that appear with your statement?

E79PTRU2

Summation - Mr. Pickhardt

1 Namely, can you form a memorialization of an agreement if the
2 memorialization itself says that this is only an agreement of
3 the parties?

4 MR. PICKHARDT: Yes, your Honor. There's no --
5 agreements, as the Court understands, commonly include
6 integration clauses, and I'm not aware of any authority that
7 would suggest that the inclusion of an integration clause
8 precludes a reformation. A reformation goes to whether there
9 is an error, not as to whether the parties intended that the
10 parole evidence be generally included with respect to
11 additional terms that are included in the agreement.

12 Now, your Honor, reformation is supposed to only occur
13 when there is a high showing of proof. It's a clear and
14 convincing standard, and we concede that that is the standard
15 that has to be met in this case. But clear and convincing does
16 not mean absolute certainty. What clear and convincing means
17 is that the evidence must demonstrate that the thing to be
18 proved is highly probable or reasonably certain.

19 So that is the standard that this Court must apply
20 when thinking about the evidence that is before it. In other
21 words, we must adduce evidence that makes it highly probable
22 that there was an error, and we think that we have easily met
23 that standard, as we will describe.

24 There also is no one form of evidence that the Court
25 must find in order to reach that standard. The Court can take

E79PTRU2

Summation - Mr. Pickhardt

1 oral evidence, documentary evidence or contextual evidence, and
2 we think that you have all three here. The first, as we just
3 talked about --

4 THE COURT: If the written agreement is clear on its
5 face, albeit possibly in error, can the Court take parole
6 evidence?

7 MR. PICKHARDT: No, your Honor. If the agreement --
8 if the agreement is clear on its face, it -- Well, let me
9 explain that. It cannot take parole evidence with respect to
10 construction. It can take parole evidence with respect to the
11 intent of the parties for purposes of a reformation claim. It
12 can take --

13 THE COURT: In other words, it can consult parole
14 evidence, define an intent of the parties vary from the written
15 expression.

16 MR. PICKHARDT: Absolutely, your Honor. And that's
17 what courts regularly do. In fact, it's kind of the purpose
18 for the standard because if a contract is ambiguous on its
19 face, as your Honor understands --

20 THE COURT: That's different. But let's say that the
21 contract is clear on its face but in error, it's contrary to
22 the intent that can be found from all other surrounding
23 documents.

24 MR. PICKHARDT: That's the reason why you have
25 reformation. It is for the Court to be able to fulfill the

E79PTRU2

Summation - Mr. Pickhardt

1 intent of the parties, notwithstanding that there is a
2 scrivener's error.

3 THE COURT: And I can take parole evidence?

4 MR. PICKHARDT: Absolutely, your Honor.

5 THE COURT: But I can't construe the clear expression
6 of the written agreement to be consonant with all other
7 contextual documents?

8 MR. PICKHARDT: Well, your Honor, as a general
9 principle, yes, but in this case, as we will explain, we think
10 that you could construe the indenture because it was created as
11 a suite of transactional documents. And, in fact, there is a
12 Second Circuit case which has said that, in looking at an
13 indenture, you can consider what the Prospectus Supplement says
14 in understanding the terms of the indenture.

15 And, in fact, this indenture has specific references
16 where it incorporates things that only appear in the Prospectus
17 Supplement. So, in fact, if you wanted to understand the full
18 indenture here, you can't, without going and picking up a copy
19 of the Prospectus Supplement and looking at information that is
20 in the Prospectus Supplement.

21 THE COURT: Point this out to me as we go along.

22 MR. PICKHARDT: Yes, your Honor. We will point you
23 out where that is. Yes. And, in fact, the Aristocrat Leisure
24 case that I referred to, specifically addresses the fact that
25 courts can look to parole evidence in considering the parties'

E79PTRU2

Summation - Mr. Pickhardt

1 intent in support of reformation. And the parole evidence
2 here, if in fact it is parole evidence, because as we will
3 argue, some of this doesn't constitute parole evidence but
4 rather is within the confines of the agreement itself, includes
5 the final document.

6 As you have seen, the final Prospectus Supplement in
7 three different places talks about the allocation of realized
8 losses and consistently describes it as being the losses going
9 first to the 1-A-3 notes before the 1-A-2 notes. This is a
10 document that is widely available and used by authoritative
11 sources, including Intex, including Moody's, including Standard
12 and Poor's, subject to them finding that there is some
13 discrepancy. But this is a very formalized document that
14 people in the marketplace used and understand in connection
15 with these transactions.

16 THE COURT: What document is that?

17 MR. PICKHARDT: It's a Prospectus Supplement. It
18 is -- As Mr. Peresechensky indicated, normally when you go onto
19 Bloomberg and you want to find out about this transaction,
20 that's the document that's on Bloomberg. It's not the
21 indenture.

22 THE COURT: I don't think he said that.

23 MR. PICKHARDT: Your Honor, he said that he had never
24 before seen on Bloomberg, when he had looked, an indenture.

25 THE COURT: Yes, but he also said -- he suggested, I

E79PTRU2

Summation - Mr. Pickhardt

1 think, that other documents also don't appear; that Bloomberg
2 does its summary from whatever source it does its summary. If
3 he wants to get beyond the summary provided by Bloomberg, he
4 has to go to something else. And the deal document, he said,
5 was the trust indenture and, lo and behold, it was there.

6 MR. PICKHARDT: Your Honor, the Prospectus
7 Supplements -- We can go back and look in the record. The
8 Prospectus Supplement is available through Bloomberg. It's
9 available through Intex. You may remember, Mr. Simonds
10 testimony where he, in fact, says that when the deal first gets
11 done, you have to use, as a legal matter, the Prospectus
12 because you're not, as a matter of law, allowed to use the
13 indenture. And I think the Court can take --

14 THE COURT: I can understand that. He said that, but
15 I didn't understand that. It seems to me it's part of the
16 deal.

17 MR. PICKHARDT: It is part of the deal, your Honor,
18 and there's no question --

19 THE COURT: The anomaly is here because there was an
20 inconsistency between the deal document, or the indenture, and
21 the Pro Supp. Normally, a summary would be used to give
22 disclosure, and registration statements will have the complete
23 documents.

24 MR. PICKHARDT: Yes.

25 THE COURT: But here, the summary is tainted because

E79PTRU2

Summation - Mr. Pickhardt

1 the sources for the summary are inconsistent, and we don't know
2 what the summary is based on.

3 MR. PICKHARDT: Well, your Honor, when you refer to
4 the summary --

5 THE COURT: I may be using old and antiquated
6 memories.

7 MR. PICKHARDT: As Mr. Mago testified, you may recall,
8 he talked about these documents, and he agreed that the
9 indentures are available but they're not always available. And
10 if you want them, you have to usually go and dig around on the
11 SEC's website.

12 These are deals that are commonly used and understood
13 and marketed based upon the Pro Supp. And it is important for
14 the Court to understand that in this deal, which closed in
15 2005, that there is no indication that anyone in the market had
16 an understanding about this discrepancy until August of 2010,
17 five years this deal is out in the marketplace. And Moody's
18 and Standard & Poor's and Intex are all operating based upon
19 the assumption that the 1-A-3 notes bear losses before the
20 1-A-2 notes.

21 And the reason why that is, is because people do rely
22 on the Prospectus Supplement, and that is why, as you heard
23 from Mary Stone, that there's a lot of care taken with respect
24 to that document. It's why there's opinions. It's why there's
25 legal liability if there are misstatements in those documents

E79PTRU2

Summation - Mr. Pickhardt

1 and so forth.

2 So this is a context in which the descriptive
3 document, the Prospectus Supplement, is actually the document
4 that people in the marketplace, not just investors but also
5 institutions that have duties for reporting accurate
6 information, rely upon. And that document, three places, says
7 that the 1-A-3 notes take losses before the 1-A-2 notes.

8 THE COURT: Is there a stip in the Pro Supp that, in
9 case of doubt, readers are referred to the trust indenture?

10 MR. PICKHARDT: Yes, your Honor, there is. There is.

11 THE COURT: Is that typical boilerplate?

12 MR. PICKHARDT: It's typical boilerplate that is
13 included in there for the lawyers as protection, but I can tell
14 your Honor, as a matter of practice, and as Mr. Mago said, that
15 doesn't mean that people pick up the Pro Supp, see that and
16 throw it out the window.

17 THE COURT: It explains why the discrepancy was noted,
18 the notices, the descriptions about these securities switched
19 the priorities from that described in the Pro Supp to that
20 described in the indentures.

21 MR. PICKHARDT: That is right, your Honor.

22 THE COURT: And so it sets up the critical nature of
23 this proceeding from the point of view -- your point of view
24 and, in effect, Mr. Johnson's point of view, that there has to
25 be a consistency; otherwise, there's confusion.

E79PTRU2

Summation - Mr. Pickhardt

1 And the second thing that I note from this is that the
2 first time there's a real case of controversy, a real dispute,
3 is August 2010.

4 MR. PICKHARDT: August 2010 is the first time when
5 there is any signal of anybody in the marketplace being aware
6 of this issue, and at that point in time, and from August 2010
7 forward, not only does Moody's change its ratings but it
8 actually issues a press release. That press release is in the
9 record. So anybody, at that point in time, who is investing in
10 these bonds that's out there, as far as, you know, information
11 about this discrepancy, it's available for them to locate and
12 to understand that that discrepancy is out there.

13 Prior to that, there's no signal that anybody is, in
14 fact, aware of this.

15 THE COURT: I'm not sure there's an exhibit reflecting
16 Moody's press release.

17 MR. PICKHARDT: It's 244, I believe, your Honor.

18 THE COURT: It is? Okay.

19 MR. PICKHARDT: And what you'll see in that exhibit is
20 actually somewhat interesting because what you will see --

21 THE COURT: You can put it up.

22 MR. PICKHARDT: Curt, if you could blow up the first
23 textual paragraph.

24 THE COURT: Okay, thanks.

25 MR. PICKHARDT: What's interesting about that

E79PTRU2

Summation - Mr. Pickhardt

1 paragraph, your Honor, and worth noting is that even Moody's is
2 not saying that simply because of that discrepancy, we're
3 automatically going to follow the indenture. What they
4 actually say is they have heard from the trustee, and the
5 trustee has indicated that, pending some other change, that
6 they are going to follow the indenture, and in as such, Moody's
7 will change its ratings.

8 So I think there's even a conditional sense in the
9 marketplace as to whether the rating agencies would
10 automatically assume that you would switch over to the
11 indenture in the face of the discrepancy.

12 THE COURT: What's the date of this?

13 MR. PICKHARDT: This is August 2010. August 23rd,
14 2010. And then, your Honor, it is also certainly important,
15 you've heard a lot of testimony about this application called
16 Intex. Intex is the standard modeling tool that is used by
17 people in Mr. Mago's and Mr. Peresechensky's business.

18 And that tool, when they were faced with this issue,
19 you have an indenture that goes one way and a Pro Supp that
20 goes another way, doesn't simply say, okay, that means we have
21 to change our model and everybody from now on, of course, will
22 be valuing this based upon the indenture. They rather include
23 functionality, and they allow investors to see it both ways.

24 So that investors, like the ones who are before you,
25 can do what Mr. Mago did and said, you know, they can assess

E79PTRU2

Summation - Mr. Pickhardt

1 the risk as between, you know, the discrepancy in the documents
2 and can perform their analysis as such.

3 Your Honor, the drafting history, I think, is
4 completely clear. If your Honor would like me to take you
5 through the high-level what the drafting history shows, I'm
6 happy to do it.

7 THE COURT: Particularly on the PSA.

8 MR. PICKHARDT: Take it up at the time of the PSA,
9 your Honor?

10 THE COURT: I want to see where the error in the PSA
11 appears.

12 MR. PICKHARDT: Okay. Well, your Honor, I'm going to
13 jump into the middle. As I described before, there was 20 days
14 of drafting history that started with a term sheet and then
15 went to the Pro Supp and then went to the indenture, and the
16 important piece is -- Curt, please go to slide 22.

17 And, your Honor, just before I go to the error, I'm
18 going to show you the edit that was made in the Pro Supp on day
19 15 of this 20-day drafting process because, as you may recall
20 from the testimony, this deal and the documents for this deal
21 had been built off of a template, which was the AHM2005-1
22 transaction. The AHM2005-1 transaction uniformly provided
23 within the transaction documents that the 1-A-3's bear losses
24 before the 1-A-2's.

25 But the allocation of loss provision was more

E79PTRU2

Summation - Mr. Pickhardt

1 complicated in that deal, and it ended up getting streamlined
2 in this deal. And whereas in the prior deal there had been in
3 all of the provisions that talked about this, this proviso at
4 the end of the provision that said provided whatever else
5 happens 1-A-3 notes get losses before the 1-A-2 notes.

6 During the drafting process of this deal, on day 15 of
7 20, that provision is streamlined. The lawyers cross out the
8 proviso and make two other changes that keep the same meaning.
9 The two other changes are the words "in that order" and a swap
10 of the two and the three that's in the preceding sentence, and
11 this shows you, your Honor, that edit. The same edit is made
12 elsewhere. And then, on --

13 THE COURT: Wait. Let me look at it.

14 MR. PICKHARDT: Sure.

15 THE COURT: This lends itself to interpretation. Each
16 one of them logically is possible, but the first is that there
17 was an intent to change substantively the sequence of
18 allocation of losses. So that would explain why, in the second
19 line, class 1-A-2 is changed to class 1-A-3, and the next line,
20 the class 1-A-3 is changed to class 1-A-2, and the phrase "in
21 that order" is then substituted.

22 The second possibility, focusing on the elimination of
23 the proviso clause, would suggest an error in terms of the
24 allocation of losses. If the phrase "in that order" were not
25 inserted and a word like "respectively" would be used, the

E79PTRU2

Summation - Mr. Pickhardt

1 losses would first go to 1-A-3 and then to 1-A-2. All right?

2 MR. PICKHARDT: Your Honor, I think under either
3 phrasing and as this document is -- this language has actually
4 been understood with these edits, this states that the losses
5 shall go first to the 1-A-3 notes and second to the 1-A-2
6 notes. That was consistent with the same meaning in the
7 underlying --

8 THE COURT: That means that 1-A-2 is a higher
9 seniority?

10 MR. PICKHARDT: That's correct. That's correct.

11 THE COURT: And that was the deal.

12 MR. PICKHARDT: That was the deal. That's what that
13 proviso says at the end. If you look at the crossed-out
14 proviso, the losses go first to the 1-A-3 and then to the
15 1-A-2. And then when you cross out that proviso and you add
16 "in that order," it would change the meaning of this provision,
17 unless you swap the three and the two. Because as it is
18 phrased here, you know, this says "To the extent such realized
19 losses are incurred with respect to mortgage loans in loan
20 group one to the class 1-A-3 notes and the class 1-A-2 notes,
21 in that order..." meaning it goes to the 1-A-3 notes and then
22 to the 1-A-2 notes.

23 THE COURT: And that's consistent with the deal. So
24 where is the error? Where does that come in?

25 MR. PICKHARDT: The error is made when this same note

E79PTRU2

Summation - Mr. Pickhardt

1 is made in the indenture.

2 THE COURT: What you have up now, which exhibit is
3 this, 210?

4 MR. PICKHARDT: This is Exhibit 210.

5 THE COURT: And this is a term note?

6 MR. PICKHARDT: This is a Prospectus Supplement. So
7 this is the document that was created after the term sheet.
8 This is consistent with what the term sheet said, and this is
9 four days before this document, the Pro Supp -- the Prospectus
10 Supplement is finalized.

11 So day 19, at 1:10 in the afternoon, June 21st, 2005,
12 there's a final version of the Pro Supp that is circulated that
13 has exactly that language that your Honor had in front of you
14 but, obviously, without the black lining because it's now
15 final. And then between 1:10 in the afternoon on that day and
16 1:15 in the morning on the next day, which is June 22nd, 2005,
17 there was a flurry of documents that were circulated because
18 June 22nd was the closing.

19 That was the closing date, and the flurry of
20 documents -- I'm going to jump to the document that your Honor
21 wants to see, but I will note that there were three documents
22 that were circulated. There was a document of a private
23 placement memorandum, then the indenture, and then the offering
24 memorandum. The private placement memorandum provides the same
25 edit. It essentially conforms itself to the final of the

E79PTRU2

Summation - Mr. Pickhardt

1 Prospectus Supplement, which had been circulated at 1:10, but
2 then we get to the error -- and this is on slide 25 -- and this
3 is the document that was circulated at 1:11 a.m. in the morning
4 on the day of closing, the document that previously had in it
5 that same proviso.

6 If you look at the very bottom of the call out that we
7 have here, which states that losses will go first to the 1-A-3
8 notes and then to the 1-A-2 notes. And you see towards the top
9 that in that order, although that shows up in that order in,
10 but the words "in that order" are added to actually give effect
11 to the ordering in which class 1-A-2 and 1-A-3 play in that
12 particular provision, except that the two and the three are not
13 swapped.

14 THE COURT: The change that was made crossed out the
15 two and crossed out the three is not carried through?

16 MR. PICKHARDT: That's exactly right.

17 THE COURT: Now --

18 MR. PICKHARDT: Now, it was carried through in other
19 documents. I can show you four minutes after this --

20 THE COURT: I saw that, but it wasn't carried through
21 in this document.

22 MR. PICKHARDT: I just want to be clear. The
23 Prospectus Supplement, which we were looking at, that was done
24 in three places. It was not carried through to this document,
25 but we also talked about some of the other offering documents,

E79PTRU2

Summation - Mr. Pickhardt

1 and it was carried through those other documents.

2 THE COURT: Yes, I saw that.

3 MR. PICKHARDT: So this same change is made in three
4 documents, I think in eight places, and the only place that
5 that change is not made, with the swapping of the two and the
6 three, is in this document.

7 THE COURT: Yes.

8 MR. PICKHARDT: And this is the error and there's
9 nothing else. I'll note, your Honor, both Lehman Brothers and
10 JP Morgan produced the entire history of this transaction that
11 they could find. So we had access to all of the e-mails back
12 and forth with respect to the drafting, and we have deposed you
13 know the witnesses on this.

14 We have gone through -- Mr. Rollin and his team have
15 had equal access to that entire history, and you will note that
16 there is no document that is being put in front of you that
17 sort of draws doubt on the sequence as we have described it and
18 the relevance of that sequence.

19 We're, obviously, not taking you through, and you
20 would take our heads off if we sought to take you through, the
21 entire drafting process. We are showing you particular pieces,
22 but I think it's relevant that there's nothing else that
23 someone can put in front of you that would suggest to you, wait
24 a minute, maybe there's some other conclusion that I should be
25 drawing here. It really is clear.

E79PTRU2

Summation - Mr. Pickhardt

1 You have the Pro Supp finalized. You have a flurry of
2 documents that are then finalized after that. The change is
3 made uniformly throughout those documents except in one place.
4 That next day, the closing day, they then file the Pro Supp
5 with the SEC. That's a pretty serious event here, where you're
6 filing it with the SEC.

7 If there had been a change in deal terms at 1:10 in
8 the morning on closing, you have to believe that the lawyers
9 are not going to then send off a Prospectus Supplement
10 knowingly to the SEC that is inconsistent with the changed deal
11 terms. There is simply no reasonable explanation that could
12 explain what we see, other than this was an error that was made
13 by lawyers working late into the night, and they didn't catch
14 it.

15 And it's also notable that not only did they not catch
16 it, but nobody in the market caught it. This deal operated
17 based upon how everybody understood it was supposed to operate
18 for five years, which is further indication --

19 THE COURT: And that's reflected in the market
20 pricing, isn't it?

21 MR. PICKHARDT: That is correct, your Honor, for the
22 first five years. You know, I don't know that there's evidence
23 that has come in with respect to what the market pricing was
24 during that time period, but there was no information available
25 if anybody --

E79PTRU2

Summation - Mr. Pickhardt

1 THE COURT: There is evidence in summary, not in --

2 MR. PICKHARDT: Correct.

3 THE COURT: -- in detail.

4 MR. PICKHARDT: Correct, correct. And so then what
5 you have is that, for that span of time, you have investors who
6 are buying this security and they're looking at the ratings,
7 their looking at Bloomberg, and I would submit to you that --

8 THE COURT: The ratings are equal, I think.

9 MR. PICKHARDT: Well, no. No, they're not, your
10 Honor.

11 THE COURT: I'm sorry, they're not.

12 MR. PICKHARDT: They start equal, and this is quite
13 pertinent, and as you remember Mr. Peresechensky telling you,
14 this is one of the things that he did when he was looking at
15 this bond, is he put the ratings for both up on his screen and
16 you see them start out equal. And then you see the 1-A-2 have
17 higher ratings when this becomes a relevant provision because
18 the deal's in a little bit of trouble. And then in 2010, you
19 know, they're going up like this. It does that.

20 THE COURT: They switch.

21 MR. PICKHARDT: That's Exhibit 252, your Honor.

22 THE COURT: That's the ratings history?

23 MR. PICKHARDT: That's the ratings history. And not
24 only is that something that's available, it's something that
25 even Mr. Peresechensky, who is claiming to have been under some

E79PTRU2

Summation - Mr. Pickhardt

1 misapprehension, admits he has up before his eyes when he is
2 thinking about this. And it shows something very unusual,
3 which is that these two bonds are in a particular relationship,
4 rating-wise, and then that relationship swaps.

5 And so up until that time, until 2010, people who are
6 investing in the marketplace certainly could, theoretically --
7 well, I'll say during that time period it's reasonable to
8 assume that parties are operating on the assumption that this
9 deal operates as it's described in the Pro Supp.

10 Now, your Honor, there have been a number of defenses
11 that have been raised. I'm happy to continue addressing --

12 THE COURT: No, you've gone a half hour so far.

13 MR. PICKHARDT: Okay. Well, actually, let me just
14 note, before I get to defenses, we think that there is a high
15 probability of an error here. We think this clears it by a
16 wide margin, but we also think that the Court, for the reasons
17 I described earlier, can just construe this contract as
18 providing for the fact that losses are to hit the 1-A-3 before
19 the 1-A-2.

20 THE COURT: And that's a notion that because of the
21 nature of this transaction, the contextual documents all have
22 to be considered.

23 MR. PICKHARDT: That's correct.

24 THE COURT: You call it a suite of documents.

25 MR. PICKHARDT: That's correct.

E79PTRU2

Summation - Mr. Pickhardt

1 THE COURT: And that will be a construction issue with
2 a reformation following the construction issue.

3 MR. PICKHARDT: That's correct. That's correct. And
4 what we have on slide 29 --

5 THE COURT: In effect, if I were to construe, rather
6 than to reform, my opinion, assuming it is affirmed, would be
7 the new reformation because the market would then consider the
8 interpretation of the document in light of judicial construct.
9 So whether I construe it or reform it, it comes to be the same.

10 MR. PICKHARDT: It comes to the same place. I believe
11 that the securities administrator will likely tell you that
12 they would follow this Court's findings regardless of whether
13 it was by construction or reformation.

14 THE COURT: That's why they seek guidance.

15 MR. PICKHARDT: That's exactly right. But both roads
16 lead to the same place. It is worth noting that there are
17 different evidentiary standards with respect to those two
18 claims. A construction claim does not require clear and
19 convincing evidence. We just would have to show, as soon as
20 you agree that there is an ambiguity, that a preponderance of
21 the evidence suggests the intent from parole evidence.

22 THE COURT: I think it's hard to find an ambiguity
23 from the text itself.

24 MR. PICKHARDT: I agree with your Honor, to the extent
25 that you are looking purely within the terms of the indenture.

E79PTRU2

Summation - Mr. Pickhardt

1 Although, there are other terms in the indenture, for example,
2 the coupons.

3 THE COURT: You allude to that. I would like you to
4 take me through that.

5 MR. PICKHARDT: The coupons -- and, Curt, if we could
6 go back to slide 14. There are distinctions between the three
7 classes of bonds that are in the 1-A category. There's 1-A-1,
8 1-A-2 and 1-A-3. There could be, theoretically, three
9 different types of distinctions. There could be the loans that
10 back them; in other words, what loans provide the cash that
11 they are entitled to and what loans can be subject to losses.
12 There also can be the way in which that cash is distributed
13 among these three classes. Or, third, there could be
14 differences in the way that losses are allocated to these three
15 classes.

16 Now, in this indenture, the first two are exactly the
17 same for these three classes. They're both subject to group
18 one loans; so they're backed by the same loans, and they get a
19 pro rata distribution of cash. So the only difference between
20 class one, class two and class three notes is the order in
21 which they get losses.

22 Now, the class 1-A-1 notes never get losses. Under no
23 circumstances do they ever get allocated losses, and obviously,
24 the matter before your Honor, in what order do the losses go to
25 the 1-A-2 and the 1-A-3? Now, the relevance of the coupons is

E79PTRU2

Summation - Mr. Pickhardt

1 that when that's the only distinction that you have in the
2 indenture and you look at the coupons, this shows that the
3 1-A-3 gets a higher interest rate, higher coupon, than the
4 1-A-2.

5 The only reason why that makes sense is if it's more
6 risk. I think the Court can understand that coupons, or
7 interest rates, are a function of risk.

8 THE COURT: All right. So in these columns, the one
9 on the left shows the class of note, 1-A-1, 1-A-2 or 1-A-3, and
10 what are the percentages in the column marked one, Note Margin,
11 and the column marked two, both under Note Margin?

12 MR. PICKHARDT: They're referred to as Note Margin
13 because that is -- when these notes get payments, that is the
14 excess on top of LIBOR, or a risk-free rate that these notes
15 receive. That's why it's called margin, because it's the
16 amount on top. And at certain points of the deal, you get the
17 note margin that's under column one, and then after a certain
18 event happens, it switches over to column two.

19 Now, column one and column two, I don't think, is
20 relevant for your purposes because you see the same
21 relationship. The 1-A-1 has the lowest interest rate, 1-A-2
22 has the second, and 1-A-3 has the highest interest rate.

23 THE COURT: Where do I find these coupons in the PSA?

24 MR. PICKHARDT: These coupons are described in the
25 PSA. This particular, for illustrative purposes, is taken from

E79PTRU2

Summation - Mr. Pickhardt

1 the Prospectus Supplement, but the coupons are listed in the
2 PSA.

3 THE COURT: Where?

4 MR. PICKHARDT: It's in the appendix. I believe it
5 is -- your Honor, I'm going to have to get you -- it's on Pages
6 48 to 49 of the appendix, but I'm going to have to get you the
7 record cite because I have my --

8 THE COURT: Do it, please.

9 MR. PICKHARDT: Your Honor, it's going to be TX2 --
10 your Honor, it's at TX2, Pages 262 to 263.

11 THE COURT: What is TX2?

12 MR. PICKHARDT: TX2 is the final indenture.

13 THE COURT: And what page is it on?

14 MR. PICKHARDT: It's on 262 and 263. It starts at the
15 bottom of 262 and carries over to the top of 263.

16 THE COURT: I see. Does section 3.38 refer to these
17 coupons?

18 MR. PICKHARDT: No. These are completely separate
19 provisions in the indenture, your Honor.

20 THE COURT: It's hard to find ambiguity that way.

21 MR. PICKHARDT: Your Honor, I believe that the -- that
22 the greatest form of ambiguity that you would find in the
23 indenture is by understanding it as also referring to and
24 incorporating the Prospectus Supplement and looking at it as a
25 suite of documents.

E79PTRU2

Summation - Mr. Pickhardt

1 THE COURT: I understand.

2 MR. PICKHARDT: I note this because I think an
3 investor --

4 THE COURT: I understand. I understand the rationale
5 for it, also, if I were to adopt it. And the only ambiguity I
6 could think of here is the number because the sequence is one,
7 three, two, rather than one, two, three.

8 MR. PICKHARDT: Yes, and you heard --

9 THE COURT: And if you assign the numbers as a
10 reflection of a certain sequence, an ambiguity is created
11 because of the jump in number. Did you say that the indenture
12 incorporated the Pro Supp?

13 MR. PICKHARDT: The indenture does have provisions
14 that incorporate the Pro Supp, which is, for example, at TX2,
15 at Page 17. If you look at the top of that page, under
16 subsection X in the carryover paragraph, you see a reference to
17 certain mortgage loans having needed to be underwritten in
18 accordance with the criteria set forth in the mortgage pool
19 underwriting standards in the Prospectus Supplement.

20 THE COURT: Okay. I think if there's ambiguity, it
21 has to be in the document itself. It has to be in the sequence
22 of numbering and, more plainly, in the context of all the
23 settle documents.

24 MR. PICKHARDT: I don't disagree with that, your
25 Honor. I will note two things, one, with respect to the

E79PTRU2

Summation - Mr. Pickhardt

1 sequence of numbers, the other thing that I think the Court
2 could take recognition of is that section 3.38 includes a
3 broader scheme with respect to the allocation of realized
4 losses. It's, obviously, just not these three classes, and in
5 all other instances, although it is a rather complicated
6 provision, if you follow through, in every single instance,
7 losses only move up the capital structure numerically. In no
8 other instance among the 26 classes of notes that were issued
9 would there be another instance where losses went down
10 numerically.

11 THE COURT: Well, it's not that they go up or down.
12 It's that they jump, one, three, two, rather than one, two,
13 three.

14 MR. PICKHARDT: I mean, I guess technically, your
15 Honor, the losses would go to two and then three and never hit
16 one. So essentially, in every other instance, to simplify it,
17 losses are described as going ten, nine, eight, seven, six,
18 five, four, two, three, and never getting to one. And so you
19 see a sequence, and then you see a reversal in that sequence,
20 and that could be a basis for finding that there was ambiguity.

21 THE COURT: Right. Okay. Defenses?

22 MR. PICKHARDT: Your Honor, there have been a number
23 of defenses that have been raised. I know one that we started
24 out the trial and then got postponed because of the discussion
25 as to whether or not this action was timely, and there's really

E79PTRU2

Summation - Mr. Pickhardt

1 two issues. One, is whether the trustee's action was timely,
2 and we think for reasons that Mr. Johnson has put in his
3 papers, the trustee's action -- excuse me, security
4 administrator's action was timely.

5 But in any event, it's crystal clear under controlling
6 Second Circuit law that Scepter's claim to the res was timely.
7 The reason being, that this indenture, like other indentures,
8 includes what's referred to as a no-action clause, which I
9 suspect your Honor may have encountered, if not in this case
10 but in other cases, where note holders are precluded from
11 bringing actions that relate to the indenture until certain
12 events occur.

13 And those events are two things, either there's a
14 default as defined under the indenture and other stuff happens,
15 or there's a failure to get -- to receive a payment. And at
16 that such time, they are then unshackled from the no-action
17 clause and are, at that point, and the first time, able to
18 actually file a litigation related to the indenture.

19 This indenture, your Honor, includes a no-action
20 clause at section 5.06, which clearly would have precluded
21 Scepter from bringing a reformation claim until it could
22 satisfy the terms of that no-action clause. What that really
23 means is that in most situations a note holder wouldn't be able
24 to bring a reformation claim until they don't get a payment,
25 and at such time as they don't get a payment, section 5.07 of

E79PTRU2

Summation - Mr. Pickhardt

1 the indenture provides they then have a right.

2 Now, in this case, the securities administrator
3 instituted a suit, and what the no-action clause says is that
4 note holders are just precluded from instituting suits. So we
5 believe that in this instance, because a suit was instituted,
6 that Scepter was able to make its claim for the res.

7 But the important part, your Honor, is the controlling
8 Second Circuit precedent in *Cruden v. Bank of New York*.
9 Because what the Second Circuit said in *Cruden* is that a
10 plaintiff's cause of action in this context cannot be deemed to
11 have accrued until they had a remedy, and they don't have a
12 remedy until they are allowed to bring a claim consistent with
13 the restrictions of the no-action clause.

14 So from Scepter's perspective in our claim that we
15 have asserted, that first became a claim that we could file in
16 January, when the securities administrator filed this action.
17 And so there's no question but that that claim is timely,
18 frankly, regardless of whether the security administrator's
19 claim was. But what the securities administrator did here was,
20 frankly, consistent with what they're supposed to do, which is
21 to not burden the Court with needless litigation. And we think
22 that trust instruction proceedings, for that reason, do not
23 need to be prematurely brought and that this one was
24 appropriately timed.

25 THE COURT: Where is the no-suit clause?
(Continued on next page)

E79JTRU3

Summation - Mr. Pickhardt

1 MR. PICKHARDT: It is on Page 87 of Exhibit TX-2. It
2 is entitled, "Limitation of suits Section 5.06." It reads:

3 "No holder of any note other than the insurer acting
4 pursuant to Section 4.12 hereof shall have any right to
5 institute any proceeding, judicial or otherwise, with respect
6 to the indenture," and then it goes on and says unless and
7 subject to the provisions below.

8 THE COURT: You can't bring a proceeding seeking
9 guidance. Only the trustee can. You can sue for breach of
10 contract. You can sue for declaratory judgment, but you can't
11 sue for trust guidance.

12 MR. PICKHARDT: I'm not aware of us being able to do
13 that, your Honor.

14 THE COURT: What is the nature of your claim?

15 MR. PICKHARDT: The nature of our claim is a claim for
16 reformation. Naturally, your Honor --

17 THE COURT: You're not an original holder.

18 MR. PICKHARDT: That's correct. We are a third-party
19 beneficiary under this agreement.

20 THE COURT: I don't know how you can have a claim.
21 You have no standing for reformation. You bought the bonds
22 subject to all the risks including the risks of poor
23 draftsmanship.

24 MR. PICKHARDT: Your Honor, as the intended
25 third-party beneficiary of this --

E79JTRU3

Summation - Mr. Pickhardt

1 THE COURT: You couldn't have been because you weren't
2 there. Unless there is a holder in due course, you take
3 whatever rights in reformation the original holder might have
4 had, but I can't see that coming on margin.

5 I think what you have here is a right to a declaratory
6 judgment based on status of the purchaser, of the instruments
7 that you had, and it goes back on American history, as early as
8 Alexander Hamilton and his decision to honor the holders of
9 government bonds even those that were bought up for pennies on
10 the dollar. It is the same thing now. You hold a bond, you're
11 entitled to whatever rights exist in the bond.

12 MR. PICKHARDT: That's correct, your Honor. We don't
13 disagree with that.

14 THE COURT: So because you're threatened with a
15 statement by the securities administrator that losses will be
16 allocated as stated in the indenture rather than the intent of
17 the documents, you have a declaratory judgment action.

18 MR. PICKHARDT: Whatever form that that takes --

19 THE COURT: I think I can go directly to the trust
20 guidance, trust proceeding itself because I don't think that
21 trustee could have sued before August 2010. It was faced with
22 a different allocation of loss.

23 MR. PICKHARDT: Your Honor, we think this can be
24 decided based upon our claims are not necessary for the
25 resolution of this action. Obviously, the securities

E79JTRU3

Summation - Mr. Pickhardt

1 administrator has filed their claims. We do believe that as a
2 note-holder, we do have the ability to file the claims that we
3 have because Section 5.07.

4 THE COURT: If I rule for guidance the way you think I
5 should rule, do you have any claim left?

6 MR. PICKHARDT: I am not sure I understand, your
7 Honor.

8 THE COURT: If I reform the trust indenture to be
9 consistent with the ProSupp and other documents, is there
10 anything left to your cross-claim?

11 MR. PICKHARDT: No, no. We would have no claim at
12 that point.

13 THE COURT: It is 5 after 3:00. We have gone 15
14 minutes. Do you want to reserve 10?

15 MR. PICKHARDT: Please, your Honor.

16 THE COURT: Mr. Rollin.

17 MR. ROLLIN: Please, your Honor.

18 THE COURT: It is 3:05.

19 MR. ROLLIN: Your Honor, I have slides as well.

20 THE COURT: I was worried you might have it.

21 (Off-the-record discussion)

22 MR. ROLLIN: May it please the court.

23 The court is, as your Honor just noted, presented with
24 two separate issues that should be viewed separately. The
25 first is the securities administrator's request for an

E79JTRU3

Summation - Mr. Rollin

1 instruction and the second is Sceptre's efforts to have the
2 contract reformed in its favor, and as the court has noted, at
3 the expense of Semper.

4 While Semper agrees the securities administrator is
5 entitled to an instruction because, as the court noted
6 yesterday, it is pinched, Sceptre is not entitled to piggyback
7 onto that request for instruction and the trust instruction
8 statutes that the securities administrator has used in its
9 application for relief.

10 It certainly should not be able to do so in part of a
11 calculated effort to transfer the \$7 million in value from
12 other people's investments. As to the instruction, the
13 administrator noted is agnostic. It simply wants and needs a
14 ruling from the court, and it has put in no evidence suggesting
15 or supporting the notion that it ought not follow the
16 indenture.

17 In fact, to the contrary. The evidence from the
18 administrator, through Mr. Cohen, which was read by Ms.
19 Braswell, was it should follow the indenture for three reasons:

20 Because amendment, one, amendment requires 100 percent
21 consent of the affected note-holders, and that is consistent
22 with, as I will talk about shortly, the requirements of federal
23 law in the Trust Indenture Act;

24 Two, a reformation or change in loss allocation would
25 harm one class of note-holders. It noted in its correspondent

E79JTRU3

Summation - Mr. Rollin

1 the note-holders the A-3 class can be adversely affected;

2 Three, and very important, the indenture, this is
3 where the documents provided by the securities administrator to
4 the various note-holders they contacted over time, the
5 indenture does not contain a provision that indentures
6 sometimes contain, and that is the ability to conform the
7 indenture to the prospectus supplement in the event of
8 inconsistency.

9 If the drafters wanted, they certainly could have
10 included that provision, as they have done on other occasions.

11 THE COURT: Maybe they thought they didn't make a
12 mistake.

13 MR. ROLLIN: I am sure they don't think they make a
14 mistake in the ones where they do include the provision.

15 THE COURT: I generally think my work is perfect until
16 I read it again. That is why I don't read it again!

17 MR. ROLLIN: But the point is that the words in the
18 document govern. The words in this document don't contain a
19 provision that words in other documents contain, and that is
20 that you can conform without consent.

21 THE COURT: I don't think that is a crucial part of it
22 because if it is not a construction but rather a reformation,
23 the assumption is that there is an error. It is normal for
24 people not to draft in contemplation of their being an error.

25 MR. ROLLIN: It was important to the securities

E79JTRU3

Summation - Mr. Rollin

1 administrator and it was one of the points that the securities
2 administrator made to note-holders as to why it would require
3 100 percent consent of affected note-holders.

4 THE COURT: Because that has to do with amendments.
5 Amendments is different than reformation.

6 MR. ROLLIN: We'll get to that. I'll preview.

7 The Trust Indenture Act which is the law that requires
8 the inclusion of language concerning consent of note-holders in
9 every indenture does not make that distinction. What the Trust
10 Indenture Act says, in Section 316 (b), is that any impairment
11 of the right to payment of principal and interest is subject to
12 consent of 100 percent of the affected note-holders. That is
13 the legal overlay atop the indenture, and --

14 THE COURT: It begs the question, Mr. Rollin. If the
15 trust indenture is to be applied, and you want to take money
16 away from a group, you're right; but if the money flowing to
17 the group is really consistent with the intent of the parties,
18 it doesn't affect Section 316 (b).

19 Apropos of that, it seems to me that both your client
20 and Mr. Pickhardt's client, having bought their securities in
21 2012, were on notice of the drafting discrepancy and assumed
22 the risk, looking for the benefit. They both sought a
23 heavily-discounted instrument which had a protectable down-side
24 and a very substantial up-side, according to how the court
25 interprets the documents. I don't think it is a case of taking

E79JTRU3

Summation - Mr. Rollin

1 money away from one and switching it to another. It is a
2 matter of how much profit each one is going to make on the
3 deal.

4 MR. ROLLIN: I don't think that that recitation is
5 consistent with the evidence in its nuance because while both
6 parties purchased at a discount, that was because the bonds
7 were affected by non-payment by borrowers.

8 THE COURT: Substantially so, but also who is going to
9 feel the impact of that loss more?

10 MR. ROLLIN: That is an important distinction to make.

11 If you know from Mr. Mago's testimony and Exhibit BN,
12 where Och-Ziff is doing its internal analysis, what it is
13 acknowledging at that time is that the Class A-3 notes are at,
14 should be at the mid to low 60's while the A-2 notes are in the
15 30's.

16 So each party is purchasing at a price that reflects
17 the -- and this analysis is based on the loss allocation
18 priority in the indenture, so, yes, Semper wanted the up-side
19 of the surge in the market, absolutely, but what Semper was
20 looking for was the up-side in the surge of the market and the
21 ability to flip the priorities so that the price they bought
22 something at an extreme discount price, 20's, 30's, 40's and
23 elevates up into the 70s through this arbitrage, and this is a
24 very different investment strategy than ours.

25 THE COURT: You both have it. By the time you bought,

E79JTRU3

Summation - Mr. Rollin

1 the market discrepancy was known.

2 MR. ROLLIN: Sure, but the price we bought, if there
3 was reversal, we would have lost a substantial amount of money.

4 It would make no rational sense to buy with the
5 expectation there would be some change to the indenture. The
6 expectation would be that the indenture would stay the same.
7 There is no economic rationale for Semper to have been behaving
8 as Sceptre did.

9 THE COURT: I don't think that is true.

10 MR. ROLLIN: Your Honor, I appreciate that. I think
11 that is how the evidence is for the parties. I want to move on
12 and talk --

13 THE COURT: We didn't have an economic analysis of
14 this. This is not a major point. I cannot assume that either
15 party is going to have a windfall profit or windfall loss. I
16 think they're both sophisticated and entering a market which
17 not only had the risk of the mortgage losses but had the risk
18 of the interpretation as well.

19 MR. ROLLIN: I don't think you have to assume the
20 windfall versus the loss manner at all.

21 THE COURT: I am not assuming. I am not going to be
22 influenced by the potential for profit or loss by the --

23 MR. ROLLIN: I understand. I appreciate that. I will
24 point out Och-Ziff's internal analysis, they would receive a
25 substantial --

E79JTRU3

Summation - Mr. Rollin

1 THE COURT: The value of \$7 million, it has been
2 valued at \$7 million.

3 MR. ROLLIN: That's right, 5M, and there would be
4 corresponding loss to us.

5 THE COURT: Yes.

6 MR. ROLLIN: Going back --

7 THE COURT: Not necessarily loss, but it could be
8 diminished profit.

9 MR. ROLLIN: No, that is not true, your Honor, and
10 here is why --

11 THE COURT: There has been no economic analysis of
12 profit and loss, only a \$7 million value to the switch.

13 MR. ROLLIN: When looking at the price that was paid
14 in the 40's, if Semper paid in the 40's and this would convert
15 the value and drop it down into the teens based on the analysis
16 performed by Och-Ziff, that would actually effectuate a
17 substantial loss.

18 THE COURT: I have had no expert analysis here and I
19 can't credit that. That is relevant for what they did to
20 understand their investment, but it is not relevant to how much
21 profitability or losses would exist, and I just can't do it.

22 I am going to interpret what I have to do based on the
23 law and based on the facts, but not affecting who makes money
24 and who loses money.

25 MR. ROLLIN: I will point out only two additional

E79JTRU3

Summation - Mr. Rollin

1 points. One is that there are facts in the record that do
2 support that analysis and there has been testimony by Mr. Mago
3 and by Mr. Peresechensky that supports that analysis.

4 THE COURT: Peresechensky agreed if he sold, he could
5 have sold and made a very substantial 30 basis point profit,
6 though he wanted more. He thought it was not fully priced.
7 The record is confused on the subject, Mr. Rollin. I think you
8 have better arguments than that.

9 MR. ROLLIN: The other point I want to make is a
10 procedural one. In that regard, as your Honor knows, we were
11 brought in and had this trial on very very short basis. There
12 were not even 26 (a)(1) disclosures much less 26 (a)(2) and
13 opportunity to develop an expert case.

14 I would be glad to do that because the facts in the
15 case do bear out the analysis as I'm explaining to your Honor.
16 I think it is an important point. This should be considered.

17 THE COURT: You had an opportunity for the time you
18 were given notice, first notice, according to Mr. Johnson, in
19 Exhibit 101, was January 27th, 2014 when you had notice that
20 there was a lawsuit in the state courts of Minnesota. You
21 could have taken the position from then on. The fact you chose
22 to wait doesn't change anything.

23 When I scheduled argument, it was in relationship to
24 Mr. Johnson's argument of irreparable damage that will be
25 suffered by the trustee and by various classes of investors if

E79JTRU3

Summation - Mr. Rollin

1 guidance were not given quickly; and, thus, this case was
2 scheduled in response to that and in response to the need of
3 many investors for early resolution. These are potentially
4 volatile securities that people may not want to hold and they
5 need to have accurate information as to the meaning of the
6 governing documents in order to make wise decisions whether to
7 buy or hold or sell.

8 And so the need for speed was great, and the fact that
9 you were on notice from January means that you couldn't have
10 suffered prejudice. At least that was my wisdom.

11 MR. ROLLIN: Your Honor --

12 THE COURT: Once I scheduled it, it was not possible
13 for me to adjust the date because there was great risk that you
14 would be pushed off into 2015. I have a criminal case that
15 follows, a copyright case to follow that, and we get close to
16 trials that are scheduled for 9/11 cases that would go on from
17 there well into 2015. So it is just not possible for me to
18 adjust the date and I gave you these dates and I had to keep
19 them.

20 MR. ROLLIN: Perhaps your Honor will consider, pending
21 a ruling, allowing us an opportunity to put in an expert
22 report?

23 THE COURT: No.

24 MR. ROLLIN: I had to ask.

25 THE COURT: You could so ask, but I can't.

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: Your Honor, back to the two cases, it is
2 equitable for the court to give the securities administrator an
3 instruction. We do not believe it is equitable to give Sceptre
4 reformation that it seeks. As your Honor noted, it doesn't
5 have standing, and it would result in economic harm to SCM, to
6 Semper, and gain to Sceptre. I understand your Honor's
7 comments, but that is what the facts bear out.

8 Now, we have argued in our trial brief and other
9 motions a number of reasons -- sorry. There is a lot of
10 feedback. I don't know if you can hear it. I am trying to
11 stay away from the microphone if I can.

12 THE COURT: Are you okay, Mr. Rollin?

13 MR. ROLLIN: Fine, thank you, yes.

14 We briefed a number of reasons why the court ought not
15 order reformation or construction and instead instruct the
16 administrator to follow the indenture. I want to focus in on
17 three because they share a unifying thread:

18 The three are, there is a high burden for reformation,
19 and I'll go into the detail about why, but it is our position
20 Sceptre has not met that high burden;

21 Two, a second consideration is the manner in which the
22 law protects bona fide purchasers; and

23 Three, as we started to talk about the Trust Indenture
24 Act and the thread that unifies the three is that each of these
25 doctrines embodies or is part of the need for predictability in

E79JTRU3

Summation - Mr. Rollin

1 commercial transactions so that markets remain stable and
2 predictable and liquid and vibrant and certain.

3 The law has evolved to contain certain default rules
4 that help guide courts to dispute resolution outcomes that
5 support and promote predictability in commercial transactions,
6 and these are three of them.

7 I'll speak first about the burden on a reformation
8 claim, and this is one of those default rules that imposes a
9 high burden precisely because it would be -- precisely because
10 the parties ought not be subject to having the terms of a
11 transaction changed after-the-fact. It is not a burden for
12 burden's sake. It is a burden that fosters predictability in
13 commercial transactions so the party to a contract doesn't have
14 the rug pulled out from under them.

15 A party seeking reformation must put forth clear,
16 positive and convincing evidence demonstrating not only the
17 probability, but the certainty of error in the making of a
18 contract. That's the George Backer case from the Court of
19 Appeals.

20 May I see TX-265, Page 2.

21 THE COURT: Do you think Backer really meant
22 certainty?

23 MR. ROLLIN: I am sorry?

24 THE COURT: Do you think Backer really meant
25 certainty?

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: I think Backer met a very high burden of
2 proof that requires -- and I will talk about this briefly in a
3 moment -- that requires that witnesses come in and tell the
4 court what happened and tell the court what the mistake was.

5 What I noted this morning during Mr. Pickhardt's
6 presentation was how he walked the court through and said
7 here's this document, here is where the switch was. Your Honor
8 should have heard that from a witness, not from Mr. Pickhardt
9 interpreting the documents. A witness should have come in and
10 said well, this is what I did and that's what I did.

11 Of all of the parties that were part of this
12 transaction, they're on Exhibit TX-265 before your Honor, and
13 of all of these institutions and their lawyers, two witnesses
14 came. Neither one had any recollection. Neither one knew any
15 of the intent of the parties. Neither one could authenticate
16 any of the documents. Neither said they made any of the red
17 lines. The presentation Mr. Pickhardt made should have been
18 done by a fact witness, not by a lawyer.

19 In fact, the drafting lawyers, one of whom I believe
20 was mentioned -- well, Mr. Ross is one lawyer who circulated
21 the e-mails, but that doesn't really tell us who the drafting
22 lawyers were. That would have been a helpful piece of
23 information, and I think the explanation for why the scriveners
24 weren't here was that at least one of them was out of state and
25 there was no mention of the others, at least the four from

E79JTRU3

Summation - Mr. Rollin

1 Thacher Proffitt.

2 Well, your Honor hears witnesses and evidence from
3 depositions taken out of state all the time. In fact, in this
4 case you heard from Mr. Cohen. We wanted to present evidence
5 from Mr. Cohen, so we took his deposition, and he is an
6 out-of-state resident, and we read it into evidence. That is
7 the way it works. The fact a witness is outside the subpoena
8 power of the court doesn't mean that evidence is excused from
9 having to come in primarily when it is potentially at least we
10 don't know from a fact witness, one of the principal drafters,
11 a drafter. We know he circulated e-mails.

12 THE COURT: We do know the sequence of documents
13 because it can be easily reconstructed, and the chain of
14 documents and drafts is evident, and one doesn't necessarily
15 have to have a witness because the witnesses may not have good
16 recollection either what happened at 1:15 in the morning, but
17 they may not. I will decide to call the witness or take the
18 deposition.

19 MR. ROLLIN: That is true. We are not trying to prove
20 a reformation. The burden is such the proponent of a
21 reformation brings in the witnesses.

22 THE COURT: Generally speaking, but sometimes the
23 depositions, the adverse party takes the depositions and knows
24 what the witness was saying. Either side could have taken the
25 deposition if anyone thought that there would be any useful

E79JTRU3

Summation - Mr. Rollin

1 memory.

2 MR. ROLLIN: And there wasn't, there wasn't, your
3 Honor. That is the important point.

4 What you don't know from any evidence is what
5 conversations took place. Why did people do what they did?
6 Are these all of the documents?

7 THE COURT: The document doesn't make sense. The
8 draft doesn't make sense. The failure to conform the cross-out
9 of the 3 and the 2 doesn't make sense. I think Mr. Pickhardt
10 makes a very good argument, if there was an intent to change
11 the sequence of the losses, that would have been a deal change
12 that would have to be disclosed and summarized in the ProSupp,
13 and it wasn't.

14 That didn't change the deal materially, and it wasn't
15 discussed, which leads me in a very clear way to believe this
16 was a scrivener's error, and the error was in the failure to
17 cross out two numbers and change them, which had been done in
18 the previous drafts. I can understand because I've been there
19 myself. You come in at 1:30 in the morning in a highly
20 pressurized situation and you're trying to conform documents
21 and they're flying all around the table and you miss one, the
22 most important one.

23 MR. ROLLIN: And everything you just said is not
24 evidence in the case.

25 THE COURT: It is not evidence. It is a fair

E79JTRU3

Summation - Mr. Rollin

1 inference to take. Would it have been better if a witness was
2 here to say that? Yes, yes, I agree with you on that, but the
3 absence of witness doesn't necessarily mean I have to take your
4 point.

5 MR. ROLLIN: Even with that sequence, you don't know,
6 and there is no evidence of it was a mutual mistake. There is
7 no evidence if it was a unilateral mistake.

8 THE COURT: Whether it was mutual or unilateral --
9 first of all, the concept of mutuality in this kind of
10 arrangement is illusory. It is like the drafting of a set of
11 cooperative documents. You have the sponsor and you have the
12 lender and you do not have anybody who is going to be buying
13 the apartments. It is the same thing, you don't have any of
14 the investors. You have the sponsor, you have the trustee, you
15 have the issuer. They're all on the same page. There is not
16 anybody adverse here. Everybody is trying to do the best
17 coming out with a fair deal and a proper deal.

18 If there had been an intent to change, it would have
19 had to have been disclosed. Otherwise, there would be a
20 material omission, misleading statement in violation of 10b-5.

21 MR. ROLLIN: Mr. Simonds testified that there were --
22 I don't want to quibble with your Honor. There was testimony
23 there were adversarial relationships between the many lawyers.

24 THE COURT: I know. It is all right to quibble with
25 me. I believe oral argument is most useful if you know where

E79JTRU3

Summation - Mr. Rollin

1 my mind is so you have an opportunity to change it. So it is
2 my habit to freely comment during the course of argument,
3 engage lawyers in discussion. So I don't mind you quibbling.

4 MR. ROLLIN: I quibble then, your Honor. Mr. Simonds
5 testified that there were --

6 THE COURT: Persuasive argument is a quibble to
7 another.

8 MR. ROLLIN: In any event, I believe the testimony is
9 with respect to Mr. Simonds, in addition to that there were
10 many other parties to the transaction as shown on Exhibit 265.
11 We heard from none of them what their intent was, what their
12 role was. I will move on.

13 The point I was trying to make with respect to
14 reformation, it is a very high burden because --

15 THE COURT: In these kinds of deals as they're
16 drafted, there is usually one associate who is left with the
17 idea of conforming the drafts, putting them together and moving
18 onto the next draft. Supposedly, it should be a partner with
19 you, but it is imperfect.

20 MR. ROLLIN: If we were the drafter, I suppose --

21 THE COURT: You never would make a mistake, right?

22 MR. ROLLIN: I am not saying --

23 THE COURT: That is the big advantage of being a
24 litigator, you pick up the pieces.

25 MR. ROLLIN: We are the second-guessers, your Honor.

E79JTRU3

Summation - Mr. Rollin

1 It is important to know in this context that this
2 shouldn't be a claim against Semper and what it purchased. I
3 am going to talk in a moment about I think it is very important
4 to draw that distinction. There are parties against whom
5 Sceptre, if it is aggrieved, can sue. That is actually the
6 Cruden case. The Cruden case in the Second Circuit isn't about
7 this situation.

8 THE COURT: How can it sue anybody?

9 MR. ROLLIN: Sorry?

10 THE COURT: How can it sue anybody except its own
11 people for putting it into an investment?

12 MR. ROLLIN: That is a good point. That is a risk
13 they took. If they have a good-faith basis to sue somebody for
14 the error that your Honor is discussing --

15 THE COURT: No, they don't. They don't. They can't
16 because they bought like you bought in 2012.

17 MR. ROLLIN: Which is exactly why they ought not have
18 a claim on assets, investment value held by somebody else who
19 was not a party to any wrongdoing.

20 THE COURT: Like all the people who bought up the
21 Revolutionary War bonds of a fledgling United States and cashed
22 it in at par when Alexander Hamilton decided that was the right
23 thing to do, it is the same thing here, the same thing over
24 time. People who buy take the instruments for what they are.
25 Either you are entitled to reform them in terms of making them

E79JTRU3

Summation - Mr. Rollin

1 consistent with the overall selling documents or you're not.
2 That is this lawsuit.

3 I don't think that the potential gain, as I said
4 before, for one party or the potential loss for another enters
5 into it. Everybody bought knowing the situation.

6 MR. ROLLIN: Your Honor, reformation claims and
7 reformation, request for reformation is an equitable
8 consideration, and the fact that if there was some harm
9 suffered, they could look to whoever committed the error is
10 part of your Honor's analysis before entering equitable relief.

11 THE COURT: Who? Who could Sceptre have sued?

12 MR. ROLLIN: Sceptre has a right --

13 THE COURT: Who could you sue? If I hold that way,
14 you could sue also.

15 MR. ROLLIN: I would be concerned about collusive
16 effect of your holding on this issue.

17 THE COURT: Say I hold in a way that is comfortable to
18 them. You could sue. By the same token, they could sue. That
19 doesn't make a difference. Your argument is that since a party
20 can sue, it has a remedy at lawful law; therefore, I should not
21 give --

22 MR. ROLLIN: That is one of my arguments.

23 THE COURT: So who could be sued?

24 MR. ROLLIN: The drafters, the parties who missed the
25 error until 2010, anybody who didn't report the error in such a

E79JTRU3

Summation - Mr. Rollin

1 way that investors --

2 THE COURT: Suppose the parties knew when they bought,
3 knew or should have known about the discrepancy? They can't
4 then sue people for the discrepancy?

5 MR. ROLLIN: That is an analysis of that underlying
6 lawsuit. The indenture gives a party who doesn't receive their
7 payment, gives that party a right to sue.

8 THE COURT: There is no active remedy at law.

9 MR. ROLLIN: I would like to talk briefly about the
10 construction claim because under New York law, Fiori versus
11 Fiori, 46 N.Y.2d 971 (1979).

12 THE COURT: Talk to me about this.

13 MR. ROLLIN: Yes, sir.

14 THE COURT: The indenture is the primary document.

15 MR. ROLLIN: Absolutely.

16 THE COURT: It is the document that sets out the legal
17 rights and obligations of the securities administrator or the
18 trustee and every party who becomes or was a note-holder.

19 How can I reform that document even though every other
20 document says something different?

21 MR. ROLLIN: I think the point your Honor made is
22 precisely the point. It is the governing document. Other
23 documents refer to it for a statement of the rights and
24 responsibilities. It is the document that is qualified under
25 and subject to the Trust Indenture Act.

E79JTRU3

Summation - Mr. Rollin

1 THE COURT: Does that mean there can be no mistake
2 worth reforming in a PSA?

3 MR. ROLLIN: Not -- and this is an important
4 distinction and goes to the distinction in the Aristocrat
5 case -- not a reformation that affects the right to payment.
6 There are other aspects of it that you can reform.

7 THE COURT: Why is that right so hallowed?

8 MR. ROLLIN: Your Honor, that is the Trust Indenture
9 Act. The Trust Indenture Act is a product of the Great
10 Depression.

11 THE COURT: But if I don't make an order that
12 adversely impacts one, the order will adversely Impact another.
13 This is zero sum gain.

14 MR. ROLLIN: I don't agree with the premise.

15 The parties, and Sceptre included, filed a notice and
16 has seen an investment gain in the price and value. There is a
17 resolution in which nobody is harmed, and that is why you
18 follow the indenture because everybody realized the investment
19 gain based on the way the market understood and valued the
20 notes based on the indenture.

21 The one way where you can cause harm through
22 reformation is by reversing because it up-ends all of the
23 market's expectations that have been reflected until the raise,
24 the prices, the credit enhancement and is set forth in the one
25 document that matters, the indenture.

E79JTRU3

Summation - Mr. Rollin

1 THE COURT: Your argument is that Sceptre can't lose
2 no matter how I rule?

3 MR. ROLLIN: I do not believe that Sceptre will lose
4 money because just as your Honor noted --

5 THE COURT: But it loses \$7 million of the transferred
6 of value?

7 MR. ROLLIN: No.

8 THE COURT: That is what your guy said.

9 MR. ROLLIN: First of all, that is what they said.
10 That is their analysis, but that is not value that is theirs to
11 have under the indenture.

12 THE COURT: Someone is going to have it, either you or
13 they.

14 MR. ROLLIN: That is just the value from the market
15 pricing when you follow the indenture as the market has handled
16 it. When you don't follow the indenture -- because the market
17 has different expectations about how losses will be
18 allocated -- if you don't follow the indenture, then it up-ends
19 the expectations of the parties who purchased on secondary
20 market -- namely, Semper -- and the value is transferred from
21 the A-3s to the A-2s.

22 THE COURT: So Peresechensky said that he had a deal
23 where he could have flipped the instruments a few days after he
24 bought it and made a neat profit, but the potential buyer from
25 him found out that there was a discrepancy and wanted to stay

E79JTRU3

Summation - Mr. Rollin

1 away from it, and Peresechensky honored it.

2 So he said that he honored it because the other fellow
3 was a nice and honorable fellow, but one could also find that
4 Peresechensky, even with the discrepancy, was looking for a
5 much larger profit and was dissatisfied with the price that was
6 offered.

7 MR. ROLLIN: But not a profit because of the
8 discrepancy. I think that is the important distinction. A
9 property because of the rising tides --

10 THE COURT: He had confidence he would guess right and
11 he would win. It seems to me from his testimony, as I infer
12 it, that just as you say Sceptre ought to win, so does Semper
13 want to win.

14 MR. ROLLIN: Through very different investment
15 strategies.

16 THE COURT: These are people who are very used to risk
17 and are looking to maximize potential profits as they minimize
18 the potential loss. I don't see it. It is a legal question
19 and it is a troublesome question because the most important
20 document is the contract, and the others are descriptive of the
21 contract.

22 And so the proposition that the trustee wants, the
23 securities administrator wants me to take is to reform the
24 basic documents to make them consistent with the subordinate
25 documents. I asked that question to Mr. Pickhardt, and he

E79JTRU3

Summation - Mr. Rollin

1 cited me to a case which said that reformation could be done.
2 So this is your chance to distinguish that case.

3 MR. ROLLIN: That is the Aristocrat case. Here is
4 what is important about that distinction. In that case the
5 parties agree there was a scrivener's error. The question
6 would be what would be the consequence of that scrivener's
7 other error?

8 What that case did not involve was an effect on the
9 payment, the right to payment that is guaranteed by Section 316
10 (b) of the Trust Indenture Act. That is the key part and that
11 is why the Aristocrat case is not on point because this case
12 has to do with affecting a payment.

13 For example, the YRC case which we cited to your Honor
14 in our motion to dismiss papers, and we incorporated it by
15 reference in our trial brief, that is a situation where they
16 couldn't get 100 percent of the note-holders to agree to delete
17 a provision of the indenture. It required 100 percent. The
18 trustees said I am not going to do it, I am not going to sign
19 it.

20 So the vast majority who wanted it changed came to
21 court, and the court said no. It requires a hundred percent,
22 and the Trust Indenture Act doesn't let me do it because it
23 requires 100 percent. That is the key distinction between the
24 Aristocrat case and the situation we have here. If it does not
25 affect the rights of payment and it's appropriate otherwise

E79JTRU3

Summation - Mr. Rollin

1 under the law, reform away; but where it affects the rights of
2 payment, neither TIA nor the indenture allow you to do it.

3 In fact, there is a provision in the indenture that
4 says in the event of any conflict, 10.08, in the event of any
5 conflict between a portion of this indenture and the
6 requirements of the Trust Indenture Act, the Trust Indenture
7 Act shall prevail. That is the difference.

8 Mr. Peresechensky went to the one document that
9 mattered. He went to the indenture.

10 THE COURT: Does that mean you can reform any minor
11 element, but you can't reform a material element?

12 MR. ROLLIN: It is specific as to those provisions
13 that are required under the Trust Indenture Act.

14 THE COURT: You can't be right. If you are out to
15 reform, then you have to reform that which is material more so
16 than that which is subordinate.

17 MR. ROLLIN: This is a very specific provision. It is
18 the impairment of payment. Whether reformation or amendment,
19 it doesn't matter under the Act. That requires consent as a
20 matter of federal law, and that only applies to certain
21 portions of the indenture, and so while your Honor could, a
22 very material term, but it doesn't affect the rights of
23 payment, the Trust Indenture Act has nothing to say about that.

24 On the right to payment and the language that it uses
25 is on that indenture security under the indenture that the TIA

E79JTRU3

Summation - Mr. Rollin

1 permits and that the indenture permits.

2 THE COURT: Got it!

3 MR. ROLLIN: That applies equally to the construction
4 or interpretation claim. It is exactly the same issue whether
5 you're looking at it from a reformation perspective or
6 construction perspective, the same, the same issue arises.
7 What you cannot do is impair or affect payment under the Trust
8 Indenture Act.

9 I do want to make a couple of points with respect to
10 that. The Fiori case, as you began to mention, says the courts
11 may not rewrite a term of a contract by interpretation when it
12 is clear and unambiguous on its face. I took note of your
13 Honor's comments earlier about the 132, 123. You'll note that
14 there was testimony that the nomenclature varies across deals,
15 and so it is not necessarily the case.

16 THE COURT: It could be 321 and 123, but not likely to
17 be 132.

18 MR. ROLLIN: It is really 2-3 or 3-2, and the reason
19 is because, as Mr. Pickhardt said earlier, the 1 class, the
20 1-A-1 doesn't take losses. So as to the allocation of losses,
21 it would be equally logical in terms of the nomenclature to be
22 2 then 3, or 3 then 2 precisely because the 1 doesn't take
23 losses. So that issue doesn't apply to 1.

24 THE COURT: History: 1, no loss; 2, a little loss; 3,
25 a lot of loss.

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: Where do you go to find out? You go to
2 the indenture. Where else was Mr. Peresechensky supposed to
3 adduce the evidence of all of the drafts, that should he have
4 looked at the draft? Is that the burden we are going to place
5 on a bona fide purchaser, that they have to find the draft
6 documents?

7 There is a case called Citigroup versus Impact. It
8 was decided in federal court in California.

9 THE COURT: He knew there was a discrepancy. He could
10 not resolve the discrepancy by looking at one instrument.
11 There was a discrepancy, meaning an inconsistency, so he had to
12 see what was inconsistent, and he didn't. He said he didn't.
13 It is hard for me to believe that.

14 MR. ROLLIN: So let's take it to that level, your
15 Honor.

16 THE COURT: This fellow is a smart fellow. It is his
17 business to look into it. He looked at every essential piece
18 of information to find it. He learned there was a discrepancy.
19 That meant he had to get to know what was the discrepancy.

20 MR. ROLLIN: Sure. Let's go there.

21 THE COURT: He looks at the trust indenture which is
22 free and clear, so I'll go by that. That doesn't teach him
23 what the discrepancy was.

24 MR. ROLLIN: There are two points on that:

25 First, let's go down that last path. Let's say he got

E79JTRU3

Summation - Mr. Rollin

1 the prospective supplement and was looking at both of them, and
2 one shows allocated losses one way and another one shows
3 allocated losses in another. What does the prospective
4 supplement tell him to do? It tells him to look at the
5 indenture. Even if he had done that, he would have been
6 referred back to the governing document, and he followed the
7 governing document. That is the point of the Citigroup v.
8 Impact case we cited.

9 The judge says the suggestion you should have to go to
10 the prospective supplement and look at it to find out what the
11 governing document means, the court says is fallacious. There
12 is one document. Certainty in commercial documents require
13 there be one governing document, and there is and the law
14 recognizes it. He did exactly what he should have done even if
15 he found both the prospectus supplement and the indenture.

16 He would have followed the instructions with respect
17 to supplement, looked at the indenture, seen the allocation of
18 realized losses, and beyond that what else could he have done?
19 That is the what law says he is supposed to do and that is what
20 he did.

21 THE COURT: You have 15 minutes if you want to pay
22 attention to the defenses.

23 MR. ROLLIN: I note, your Honor, in the context of the
24 Impact case, that is a case which I think is on all fours with
25 this one certainly in all material respects, and it notes that

E79JTRU3

Summation - Mr. Rollin

1 there is an adequate remedy of law, and that adequate remedy of
2 law is a goes against the party who made the mistake.

3 THE COURT: What is there to the laches defense?

4 MR. ROLLIN: Sure. Thank you, your Honor. The laches
5 defense is as follows:

6 Both the indenture trustee and the securities
7 administrator were on notice at the end of 2010 of the
8 discrepancy. They intentionally did not -- well, let me go
9 back. They did not take action until 2014, and what happened
10 in-between was that we bought. In 2010 when the discrepancy
11 came to light, and as Mr. Cohen testified, they knew the losses
12 would eventually hit. They didn't know when, but they knew
13 they would hit. If they would have taken action, this action
14 at that time, then we would have bought or not bought based on
15 whatever the outcome of that was.

16 But having waited and not taken this action until
17 years later and years after Semper's purchase, that is
18 quintessentially laches.

19 Now, during that course of time, as your Honor saw
20 through the testimony of Mr. Cohen, there were a number of
21 note-holders who were approaching both the indenture trustee
22 and the securities administrator, telling them about this,
23 asking them to do something about it, and they didn't do it.
24 They conditioned it upon receiving direction and indemnity, and
25 they chose not to do it over and over again, in consultation

E79JTRU3

Summation - Mr. Rollin

1 with counsel, consultation with the indenture trustee and the
2 owner trustee and all of their very good lawyers.

3 They chose not to do it.

4 THE COURT: What is the test of laches?

5 MR. ROLLIN: Your Honor, the test of laches is that
6 the amount of time waited was unreasonable and that the party
7 was prejudiced by it. These facts are quintessentially that.
8 They knew it was that. They knew it was a problem in 2010.
9 They didn't do something about it.

10 THE COURT: You didn't wait between 2010 and 2012 and
11 said ah-huh, there has been no cause of action in the court.
12 That means I can go in and say goodbye. That doesn't describe
13 what you did. You were presented with an investment
14 opportunity in 2012. Perechensky did his analysis. He
15 concluded that he would come out okay, and he took the
16 investment. There is no laches.

17 MR. ROLLIN: Had they come to court and asked for this
18 instruction, then the discrepancy that is at the heart of this
19 issue and without which we wouldn't be here wouldn't exist
20 because it would have been rectified timely and before we
21 purchased. Because we purchased, we are now faced with the
22 situation where the value of our notes could go from the 70's
23 all the way down to the teens. That's prejudice. That would
24 not have happened.

25 THE COURT: Tell me about equitable estoppel.

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: The equitable estoppel defense is
2 principally with respect to the notice, the communications that
3 Mr. Peresechensky had with the securities administrator after
4 the purchase on October 3 and October 4, 2012.

5 I think it is important to distinguish that sort from
6 the bona fide purchaser analysis. The bona fide purchaser
7 analysis is what happened at the time of the purchase, the
8 reliance on the indenture, the fact if you had the ProSupp and
9 indenture in front of him, he would have been referred to the
10 indenture. That is what he did. That is a bona fide
11 purchaser.

12 Here the discrepancy comes to him, and he learns of
13 the discrepancy through Mr. Haghighat the next day and confirms
14 with the securities administrator what are you going to do? He
15 leaves a message, I think he said, and there is a series of
16 e-mails. I believe it is Exhibit TX-V, and in those e-mails he
17 asked are you going to follow the indenture? And the
18 securities administrator said absent an amendment, we are going
19 to follow the indenture.

20 Mr. Peresechensky says well, what is going to trigger
21 an amendment? And they come back and say consent from 100
22 percent of the affected note-holders. Mr. Peresechensky says
23 I'm not going to consent.

24 THE COURT: Do you think that Wells Fargo had a legal
25 obligation not to bring this lawsuit?

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: A legal obligation not to bring this
2 lawsuit? We have no qualm with the need for guidance and
3 instruction, but the available remedies are determined by the
4 equities and by the law.

5 THE COURT: So they could possibly pay out according
6 to the trust indenture by delaying issuing guidance.

7 Once they get guidance from me, if it is contrary to
8 what they have been doing before, they'll have a choice, either
9 follow my holding or do what they have been doing. Where is
10 the equitable estoppel?

11 MR. ROLLIN: The estoppel is in seeking this form of
12 relief, not bringing the action. It is asking for relief that
13 it told us, right, it would not -- that this would not happen
14 not in terms of bringing the action, but in terms of unwinding
15 the loss allocation priority in the indenture.

16 THE COURT: What they were worried about if I don't
17 give them guidance, they may have to pay out according to the
18 trust indenture and they'll get sued by Mr. Pickhardt. They
19 want me to give them guidance.

20 MR. ROLLIN: That's right. We think your Honor should
21 give them guidance, and the guidance is to follow the
22 indenture.

23 THE COURT: If I give them guidance, there is no
24 longer equitable estoppel.

25 MR. ROLLIN: If you give them guidance?

E79JTRU3

Summation - Mr. Rollin

1 THE COURT: And they follow my guidance, there is no
2 equitable estoppel. Equitable estoppel would be paying out
3 differently without guidance. They can't do that.

4 MR. ROLLIN: I believe the estoppel came in --

5 THE COURT: You can't say there is estoppel because
6 they went to court.

7 MR. ROLLIN: If the guidance sought to the extent that
8 it asked to follow the indenture, no problem. But, yes, I
9 don't believe they should have come to court and ask for
10 guidance. They could potentially reverse the loss allocation
11 in the indenture because they had previously told Semper that
12 they wouldn't do that, that they would not -- that the only way
13 to reverse the loss allocation in the indenture was by
14 amendment. It is more nuanced. That is the part they have not
15 asked for. I don't believe that is the part your Honor can --

16 THE COURT: I don't think it can prevent them from
17 asking whatever guidance they think they need. Your next one
18 is unclean hands and unjust enrichment.

19 MR. ROLLIN: And these have to do with Sceptre, and
20 this is Exhibit BN and this is the test that came in through
21 Mr. Mago. This is an effort to take investment value through
22 litigation.

23 THE COURT: This is not against Wells Fargo.

24 MR. ROLLIN: No. Sceptre. That's right. If a party
25 wants to do equity --

E79JTRU3

Summation - Mr. Rollin

1 THE COURT: What would happen if I dismiss their
2 claims but the guidance was beneficial to them? Is the trustee
3 disabled from giving them that extra benefit?

4 MR. ROLLIN: I don't think that having engineered the
5 process and filed the claim and brought in the evidence, the
6 only evidence, to the extent that it is evidence, that Sceptre
7 should obtain the benefit of such an outcome or that, more
8 importantly, whatever benefit they gain is one thing, more
9 importantly that we don't suffer the detriment from that. That
10 is our objection, is that be don't suffer a detriment that
11 would be unwarranted in law or in equity.

12 Your Honor, the document that is before you on the
13 screen is the evidence that's in with respect to the pricing
14 across time, the various price observations, and this goes
15 exactly to the issue we have been talking about both with
16 respect to unclean hands and the windfall to one and/or
17 detriment to the other and why in equity it ought not happen.

18 The A-3 --

19 THE COURT: What is the assumption here? These are
20 actual market prices?

21 MR. ROLLIN: These are the market prices. These are
22 the market color that we have been talking about of observable
23 market prices, offers, bids, trades that inform where these two
24 sets of notes are at in the market at particular times.

25 You'll notice, draw specific attention to the A-3

E79JTRU3

Summation - Mr. Rollin

1 class in green in July of 2013 and the A-2 class in the red at
2 that same time. Those two points in July of 2013 reflect the
3 analysis performed by Och-Ziff about what will happen, the
4 observable prices at the time and then what would happen if
5 your Honor reversed it. Those two lines at that point in time
6 would be switched and all of the --

7 THE COURT: The red would become green and green would
8 become red.

9 MR. ROLLIN: Because the tranche sizes are different,
10 that is not exactly right. It actually means because the A-2
11 class is three times bigger than the A-3 class, the detriment
12 to the A-3 would be three times more dramatic than the benefit
13 to the A-2.

14 If if they go up by 20 points, we go down by 60
15 points, that is what their analysis is, Och-Ziff analysis.
16 That is why we are here. That is why they have a claim to the
17 res. That is what they want. They want what they bought.

18 THE COURT: Do that again. The red is the 1-A-2
19 notes?

20 MR. ROLLIN: Yes.

21 THE COURT: You have A-3?

22 MR. ROLLIN: Yes.

23 THE COURT: So I note that 1-A-2 from 2012 is selling
24 below 1-A-3. That must mean that the market reflects 1-A-3 of
25 the senior notes to 1-A-2?

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: Exactly.

2 THE COURT: However, 1-A-3 is ascending in value to
3 July of 2013 while 1-A-2 is barely moving.

4 MR. ROLLIN: Those are the observable points. It is
5 difficult to know what the intermediate points would be. Yes,
6 you see they're both ascending in value because of the market
7 surge Mr. Peresechensky testified about. The market for these
8 bonds is getting better, and so the rising tide lifts both
9 boats.

10 THE COURT: Because the mortgages are performing
11 better. Is that right?

12 MR. ROLLIN: There are various factors. The servicing
13 of the mortgages has definitely improved in the industry over
14 time, and I don't know whether the mortgages are performing
15 better per se. I think that is right. The losses still
16 haven't hit.

17 THE COURT: The only thing I can see here is that the
18 market between February 2012 and November 2013 is treating the
19 three bonds as senior to the two bonds.

20 MR. ROLLIN: Which means it is following the
21 indenture.

22 THE COURT: Yes.

23 MR. ROLLIN: Exactly. Those are the reasonable market
24 expectations of all of the participants.

25 THE COURT: Yes.

E79JTRU3

Summation - Mr. Rollin

1 MR. ROLLIN: That is what the credit rating agencies
2 say.

3 THE COURT: And so the import of your remarks, Mr.
4 Rollin, forgetting about Semper and Sceptre, is that all the
5 holders of the 3 class will be adversely affected in relation
6 to the 2 class?

7 MR. ROLLIN: Exactly, yes.

8 THE COURT: And since investors have been purchasing
9 in reliance on them, it will be inequitable to deal them a blow
10 while enhancing the value of the 2 class.

11 (Continued on next page)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E79PTRU4

Summation - Mr. Rollin

1 MR. ROLLIN: Exactly.

2 THE COURT: Okay. You still have five minutes. You
3 don't have to use it.

4 MR. ROLLIN: I won't. Thank you.

5 THE COURT: Thank you. Mr. Pickhardt, he's not ceding
6 you five.

7 MR. PICKHARDT: I won't take it, your Honor.

8 THE COURT: Leave that one up, will you?

9 MR. PICKHARDT: Actually, your Honor, I would
10 appreciate it if you would leave that up.

11 THE COURT: Is this an exhibit or is this a chart?

12 MR. ROLLIN: It's a chart that we made, but it's all
13 based off of testimony and exhibits in the record.

14 THE COURT: Most from Mr. Peresechensky?

15 MR. ROLLIN: No, your Honor. Quite a bit of it comes
16 from Mr. Mago, and the Exhibit BN came in through Mr. Mago.

17 MR. PICKHARDT: Your Honor, there's actually three
18 spots on this chart that reflect actual trades and only three.
19 All of the rest of this is supposition, and it also -- to the
20 extent that there was going to be analysis on this and what the
21 impact would be to certain bondholders -- would be the subject
22 of expert testimony.

23 What you heard from Mr. Peresechensky, as well as from
24 Mr. Mago, is that, in fact, people don't know where these bonds
25 trade in the market because this is not a stock exchange where

E79PTRU4

Summation - Mr. Rollin

1 people can go out and can see exactly where trades are changing
2 hands. The only trades that we know about in these two bonds
3 during the entire time line reflected on these charts, are
4 trades by the two parties who are in front of you. And that
5 includes Semper's purchase in September of 2012 at 47 and a
6 half, and Scepter's purchases in January of 2012 and then again
7 in December of 2013 and March of 2014, at which they purchased
8 at 42 and a half and 44 and a half. Those are the only trades,
9 your Honor.

10 THE COURT: What was the first one?

11 MR. PICKHARDT: The first one is Semper's purchase in
12 September of 2012, when they purchased at 47 and a half.

13 THE COURT: And a quarter.

14 MR. PICKHARDT: Well, what it says here is 47 and a
15 quarter. They then paid another quarter to the broker; so you
16 sometimes see it referred to as 47 and a quarter, but the
17 actual cash out-of-pocket was 47 and a half.

18 THE COURT: Okay.

19 MR. PICKHARDT: And then you have some trades that
20 were by Scepter, including one in January of 2012, which you
21 heard Mr. Mago, that was not an auction. That was, rather, a
22 bond that was purchased as a part of a larger portfolio, where
23 the portfolio was bought in price, not this bond. And then you
24 have two more recent purchases, one in December of 2013 and the
25 other one in March of 2014, and those two purchases were at

E79PTRU4

Summation - Mr. Rollin

1 around 42 and a half and 44 and a half.

2 THE COURT: I got it.

3 MR. PICKHARDT: That's it.

4 THE COURT: But the relationship is still pretty much
5 as is shown. The market seems to be valuing the three series
6 higher than the two series.

7 MR. PICKHARDT: Well, your Honor, I don't know, when
8 you say "the market," who you're referring to.

9 THE COURT: Whoever is buying and selling in the
10 market or offering to buy and sell.

11 MR. PICKHARDT: Well, there's actually no evidence of
12 anybody actually buying and selling in this market. That's why
13 I think it's a little bit of a misnomer to talk about this as
14 being a market. These are bonds that come available for sale
15 very rarely, and when they do, it's idiosyncratic as to how
16 they get priced.

17 And so to talk about a market, that's why you've heard
18 testimony about market color and what is market color. Well,
19 market color is not trades. It's not trades.

20 THE COURT: What's market color?

21 MR. PICKHARDT: Market color is somebody sending
22 around information saying this is where I think something might
23 trade. It's information. It's rumor. It's innuendo. It is
24 speculation. It is not actual trades.

25 THE COURT: It's stuff that forms bids, and bids are

E79PTRU4

Summation - Mr. Rollin

1 offers to buy or sell, and if they're matched, there's a
2 transaction, unless the guy wants out, and the other party
3 says, okay, I'll let you out.

4 MR. PICKHARDT: The reason why this is important, your
5 Honor, is because what's being suggested is that there are
6 people out there who have been purchasing 1-A-3 bonds in the
7 60s and in the 70s, and depending on how this Court rules, it
8 could have an impact on the value of their purchases. There's
9 a few problems with that.

10 THE COURT: People could make a lot of money. People
11 could lose a lot of money.

12 MR. PICKHARDT: That's the first problem. Look, I'm
13 not asking for sympathy for my client, your Honor. My client
14 is a sophisticated fund who makes complicated determinations
15 with respect to risk based upon all kinds of determinations.

16 THE COURT: But I should understand that they pay your
17 bill?

18 MR. PICKHARDT: And they pay my bill. Unfortunately,
19 the smart ones are back at the company; so they're the ones
20 actually assessing risk, and they just ask me to do things like
21 this.

22 THE COURT: We have the fun, and they make the money.

23 MR. PICKHARDT: But there's no reason for you to have
24 sympathy for my client. My client purchased at a period of
25 time --

E79PTRU4

Summation - Mr. Rollin

1 THE COURT: As I said before, I don't think this is a
2 case of tea and sympathy. It's a case of law, whether I do or
3 I don't reform the document.

4 MR. PICKHARDT: I agree with that, your Honor. And on
5 the point of law, there were a couple of cases that were
6 mentioned, YRC and Impact.

7 THE COURT: Yes, tell me about that.

8 MR. PICKHARDT: They're not reformation cases. The
9 Impact case is a securities fraud case, where there was intent
10 talked about, as far as what could be the basis for a
11 securities fraud case. It's not a reformation case. It
12 doesn't say one syllable about reformation.

13 The YRC case, similarly, is not a reformation case
14 because what Mr. Rollin suggested is that YRC stands for the
15 proposition that if you have a hundred percent note holder
16 support, that you're precluded from reforming an indenture. It
17 actually says something different, which is, if you don't have
18 a hundred percent support, you can't amend, if that's what the
19 provision in the indenture says. Well, that's exactly what we
20 saw here.

21 THE COURT: It's not an amendment.

22 MR. PICKHARDT: Exactly, you're right. It's not an
23 amendment, and that's why YRC --

24 THE COURT: What do you think of the Trust Indenture
25 Act?

E79PTRU4

Summation - Mr. Rollin

1 MR. PICKHARDT: The Trust Indenture Act, there is not
2 a single piece of authority to suggest that the Trust Indenture
3 Act is meant to preclude reformation. And the point that I
4 would make there, your Honor, is the Aristocrat case was a
5 trust indenture case covered by the Trust Indenture Act.

6 I also would like to address what would be the
7 implications of the arguments being made here. If we could
8 pull up slide 14, Curt. Your Honor, I'd like you to imagine
9 that this case was slightly different. If instead of the error
10 that we're facing, we had an error with respect to the coupon
11 rates. And imagine if this case was that someone made a
12 mistake at 1:15 in the morning, and instead of 0.35 percent for
13 the 1-A-2 bond, wrote 3.5 percent.

14 And you had the lawyer come in and give you testimony
15 saying, you know what, your Honor, I screwed up, I was up too
16 late, I accidentally put the decimal point in the wrong place,
17 no question that was an error. The implication of Mr. Rollin's
18 argument is that your hands would be tied as long as the 1-A-2
19 holder was in here saying, hey, Judge, I don't consent to this
20 because I'm going to get the benefit of that 3.5 instead of
21 that 0.35.

22 That's the implication of Mr. Rollin's argument, is
23 that the Trust Indenture Act would divest you of the ability to
24 fix an error no matter how clear and no matter what the
25 equities. It's an absurd reading of the Trust Indenture Act as

E79PTRU4

Summation - Mr. Rollin

1 being intended to preclude a court, in its powers, from being
2 able to fix wrongs where it encounters them.

3 And the last thing I would note, your Honor, is that
4 if you're thinking about the equities in this case, there's
5 been a lot of, you know, talk about the two parties who are in
6 front of you. It's important to note neither of us are
7 actually even majority holders in the class that's at issue.
8 Your decision is going to impact more people who are on the
9 outside of this courtroom than it's going to impact on the
10 inside of this courtroom.

11 THE COURT: Frankly, I don't know how the impacts
12 would run. There must be people who have held onto these bonds
13 from inception, and there may be speculators as well.

14 MR. PICKHARDT: Yes, and so let's --

15 THE COURT: It's probably true about most things in
16 the market, some people hold on, some people buy and sell.

17 MR. PICKHARDT: I think that's absolutely right. So
18 let's talk about those two categories.

19 THE COURT: And that's why I say that I can't make
20 this decision on the basis of who's going to make money and
21 who's going to lose money. I have to make this decision by
22 doing the right thing.

23 MR. PICKHARDT: I think you're right, your Honor, and,
24 frankly, you will not be doing the wrong thing by any investor.
25 Either you have classes of investors who, like us, are

E79PTRU4

Summation - Mr. Rollin

1 essentially speculators based upon risk, or you have classes of
2 investors who bought before the information about this
3 discrepancy had come out, and at that point, they're buying on
4 ratings, they're buying on Intex, they're buying on the
5 Prospectus Supplement, and all of those would have lead buyers
6 to buy believing in how the indenture is requested to be
7 reformed.

8 THE COURT: That's right.

9 MR. PICKHARDT: Either you have a class of
10 speculators, who aren't entitled to have their interests
11 protected because they were speculating and buying based on
12 risk --

13 THE COURT: I agree with that. Let me give Mr. Rollin
14 the last comment based on this last argument that Mr. Pickhardt
15 made in terms of the Trust Indenture Act --

16 MR. ROLLIN: I'll be glad to.

17 THE COURT: -- and the decimal error.

18 MR. ROLLIN: I'll be glad to. A person who is harmed
19 by the mistake or intentional conduct of somebody else can
20 certainly sue that person, and the Trust Indenture Act
21 guarantees that right. So does the indenture.

22 THE COURT: So that would be --

23 MR. ROLLIN: That is not this case.

24 THE COURT: That would be an act of remedy of law.

25 MR. ROLLIN: That is not this case. That is a case

E79PTRU4

Summation - Mr. Rollin

1 that has not arisen yet because the losses have not hit, either
2 one, yet, but the Trust Indenture Act allows --

3 THE COURT: That's why it's styled as a guidance case
4 by the trustee because the trustee knows with certainty that
5 there's not enough money to pay all the coupon holders and some
6 are going to be without interest. And it's going to affect the
7 price, and he needs to know whether it should impact the threes
8 or the twos. And then you guys will be able to sue, but you'll
9 have a different judge.

10 MR. ROLLIN: If a party --

11 THE COURT: I hope.

12 MR. ROLLIN: You haven't enjoyed yourself, your Honor?

13 THE COURT: Immensely. I think I got your point.

14 Okay. I want to tell you that it's been a nice case,
15 and I apologize for being harsh from time to time, but you've
16 taught me a lot. So we'll convene -- what time did we say,
17 Friday at 2:30? Okay. Have a nice, relaxed time while I work.

18 MR. PICKHARDT: Thank you, your Honor.

19 MR. ROLLIN: Thank you, your Honor.

20 MR. JOHNSON: Thank you, your Honor.

21 (Adjourned to July 11, 2014, at 2:30 p.m.)
22
23
24
25

INDEX OF EXAMINATION

Examination of:	Page
BORIS PERESECHENSKY	
Cross By Mr. Pickhardt	374
Cross By Mr. Johnson	393
Redirect By Mr. Rollin	397
Recross By Mr. Pickhardt	402

PLAINTIFF EXHIBITS

Exhibit No.	Received
TX-251 and TX-252	374
TX-227	384
TX220	408
101, 102, 103 and 10	410

DEFENDANT EXHIBITS

Exhibit No.	Received
205, 206 and TX9	407